

NOMINATION OF JOHN M. MITNICK

HEARING

BEFORE THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

NOMINATION OF JOHN M. MITNICK TO BE GENERAL COUNSEL, U.S.
DEPARTMENT OF HOMELAND SECURITY

OCTOBER 3, 2017

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NOMINATION OF JOHN M. MITNICK

TUESDAY, OCTOBER 3, 2017

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:35 a.m., in room SD-342, Dirksen Senate Office Building, Hon. James Lankford, presiding.

Present: Senators Lankford, Daines, McCaskill, Tester, Peters, Hassan, and Harris.

Senator LANKFORD. Good morning. Today we will consider the nomination of John Mitnick to be the General Counsel (GC) of the U.S. Department of Homeland Security (DHS).

Before we begin, especially since this is a hearing related to homeland security and the issues here, I would like for us to be able to start with a moment of silence in recognition and memory of those lives that were lost in Las Vegas and those that are still struggling in the hospital to recover, the first responders, and other individuals. So let us have a moment of silence.

[Moment of silence.]

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Thanks. Mr. Mitnick has had an impressive career, both the public and private sector, which I believe has prepared him well for the role which he has been nominated.

The Committee takes these nominations very seriously. We are pleased to have a strong nominee in front of us.

Mr. Mitnick is currently the Senior Vice President and General Counsel and Secretary of the Heritage Foundation. Previously, he served as Vice President and General Counsel of the Raytheon Company's Technical Services. Mr. Mitnick has spent considerable time in public service as well, first served at the Department of Justice (DOJ). Later, he served in the Department of Homeland Security during its inception in 2002 and 2003 and then advanced to become an Associate General Counsel for DHS. He also served as an Associate Counsel to President George W. Bush from 2004 to 2007. He holds bachelor degrees from Emory University and Oxford University and a juris doctorate from the University of Virginia School of Law.

The staff interviewed Mr. Mitnick on an array of issues, and he has thoughtfully and competently answered each question.

The Committee is confident Mr. Mitnick is qualified to be the General Counsel of the Department of Homeland Security.

I now recognize the Ranking Member, Mr. Peters, for his opening statement.

OPENING STATEMENT OF SENATOR PETERS

Senator PETERS. Well, thank you, Chairman Lankford, and thank you, Mr. Mitnick, for your willingness to serve. And I know you have members of your family here that I am sure you will introduce at the beginning of your testimony, and I am certainly very pleased and glad that they are here with you today.

Mr. Mitnick, you have been nominated for a position that can influence the actions of the Secretary and everyone at the Department of Homeland Security, and during this nomination process, it is my hope that you will convey the values and judgment required to support the DHS mission.

First and foremost in DHS's mission is to safeguard the American people, our homeland, and our values, and this is a critical juncture for the DHS, as threats to our national security abound from both international and domestic terrorism. And our hearts certainly go out to all those affected in the Las Vegas shooting this week, and our thanks go out to all of the first responders who are providing assistance to those victims.

Millions of Americans have also been affected by the wrath of Mother Nature as multiple hurricanes battered several Southern States and island territories off the coast of Florida in September. Citizens in those areas, particularly in Puerto Rico and its neighboring islands, are in dire need of assistance, and with many lacking access to potable water and food, let alone electricity, these citizens depend on DHS for survival for their lives.

Still others in our country face a threat of being deported from the only country that they know. Of course, I am referring to the Dreamers who came to the United States as children and by no choice of their own.

If confirmed, Mr. Mitnick, you will be in a position to influence DHS response to these threats and the needs of American citizens. I found it comforting that you mention in your statement your support of your family that is here with you today, and I trust that you will see the people in need across the country as a collection of families very similar to your own as you work tirelessly to protect them and to provide for them.

I will be asking you a series of questions today designed to collect a greater understanding of your values and fit for this very important job, and as the Ranking Member of the Federal Spending Oversight and Emergency Management Subcommittee, I look forward to hearing your plans for working with Congress in the oversight capacity.

You and I both have an interest in serving the public, and it will be important that we respect one another's roles in doing so.

I further hope to get a sense of your willingness to scrutinize Executive Orders (EO) relative to DHS work and mission. The General Counsel will often find themselves as the line of defense for the civil liberties that our communities rely on, and it is an imperative that the individual in that role is prepared to protect our Constitution and the people of the United States without bias for a particular political party.

Thank you in advance for your time and candor today, and should you be confirmed, I look forward to working with you in protecting our great nation.

Thank you.

Senator LANKFORD. It is the custom of this Committee to swear in all witnesses that appear before them, so if you would please stand and raise your right hand.

Do you swear the testimony you are about to give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. MITNICK. I do.

Senator LANKFORD. Thank you. You may be seated.

Let the record reflect the witness answered in the affirmative.

Mr. Mitnick, we would be glad to be able to receive your opening statement. If you would please also introduce your family, and let us get to know them a little bit better and then glad to be able to hear about your statement.

TESTIMONY OF JOHN M. MITNICK,¹ NOMINATED TO BE GENERAL COUNSEL, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. MITNICK. Thank you, Senator.

Chairman Lankford, Ranking Member Peters, and distinguished Members of the Committee, it is an honor for me to appear before you today as the President's nominee to be the General Counsel of the Department of Homeland Security.

I am grateful to the President and Acting Secretary Elaine Duke for the trust and confidence they have placed in me, and I thank the Committee and its staff for moving forward expeditiously on my nomination.

I would also like to recognize and thank the members of my family who are here today. My wonderful daughter Hadley, who is taking a few hours off from kindergarten this morning, is sitting behind me. Hadley is the light of my life, and I feel very fortunate that she can share this event with me and see how our government functions. She should have quite a story to share with her classmates and teachers when she returns to school this afternoon.

I am grateful to my mother, Dr. Barbara Mitnick, who is also here. She instilled in me a love of learning early on when, after graduating from Cornell University and having children, she resumed her education, ultimately earning a master's degree and a doctorate in the history of American art and architecture. She went on to a distinguished career in scholarship, teaching, and public service, which continues to this day. She will undoubtedly give us a memorable tour of the Capitol after this hearing.

I regret that my father, Howard Mitnick, cannot be here today. He passed away suddenly in March 2012, and I miss his love and wise counsel every day. He was a lawyer's lawyer, an astute lifelong student of business, economics, and public policy, and a true patriot, and I know that this would have been a proud day for him. I carry his memory with me in everything that I do.

¹ The prepared statement of Mr. Mitnick appears in the Appendix on page 21.

At this time, I also want to remember my grandparents, Sydney and Nan Jacobs, and Bernard and Sophie Mitnick. All but my grandfather Syd were immigrants to our great country early in their lives, and Syd was the son of immigrants. Their stories of leaving their homelands to seek freedom and opportunity in America and working hard to succeed here, while typical in many ways of a large number of my fellow citizens, are constant inspirations to me. They raised families, became pillars of their communities, and built strong foundations for the generations to come. Theirs was an extraordinary and awe-inspiring generation, and I consider myself very fortunate to have known all of them well.

I will always cherish the memory of the day in June 1993 when my grandfather Syd, who was also an attorney, at the age of 88 realized a dream that he had since I was born by moving my admission to the U.S. Supreme Court Bar in open court.

If confirmed, it will be a privilege and an honor for me to return to DHS and work side by side with the Department's more than 240,000 dedicated professionals to safeguard the American people, our homeland, and our values.

I say "return" because I was there at the beginning. As a detailee from the Department of Justice in the DHS Transition Planning Office, I was one of a small group of attorneys tasked with supporting the establishment of DHS in late 2002 and early 2003. I went on to serve as the Department's first Associate General Counsel for Science and Technology (S&T) until I moved to the White House in 2004, where I served successively as Deputy Counsel of the Homeland Security Council and as Associate Counsel to the President with primary responsibility for all homeland security legal matters.

Although it has been many years since I served in DHS and I have admired from afar the great strides made by the Department, I am generally aware of the ongoing challenges of integrating and coordinating its many disparate elements. If confirmed, I intend to build upon the good work of my predecessors to ensure that the more than 1,800 talented and dedicated attorneys in the Office of the General Counsel (OGC) provide sound, timely, actionable, and consistent legal advice throughout the Department while also ensuring the protection of the privacy and other legal rights of Americans.

In doing so, I will employ my 28 years of experience practicing law at the highest levels in government and the private sector, which has included supervising senior attorneys and serving as an integral member of senior leadership teams that managed organizations ranging from several hundred to more than 9,000 employees.

I also understand that oversight activities are essential functions of the Congress that are necessary for the exercise of its constitutional powers and are also vital to the proper functioning of the executive branch.

Therefore, if confirmed, I will look forward to working with you and your staffs in a cooperative manner.

Chairman Lankford, Ranking Member Peters, and distinguished Members of the Committee, thank you again for this opportunity

to appear before you, and I would be pleased to answer any questions.

Senator LANKFORD. Thank you, Mr. Mitnick.

There are three mandatory questions we ask of every candidate that comes before this Committee, and then after we go through those three quick questions, the Ranking Member and I are going to defer to Senator Tester to opening questions there.

Three quick questions, I will need a yes or no answer on these.

Is there anything that you are aware of in your background that might present a conflict of interest with the duties of the office to which you have been nominated?

Mr. MITNICK. No.

Senator LANKFORD. Do you know of anything, personal or otherwise, that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated?

Mr. MITNICK. No.

Senator LANKFORD. Do you agree, without reservation, to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

Mr. MITNICK. Yes.

Senator LANKFORD. Great. Thank you.

Senator Tester, you are recognized.

OPENING STATEMENT OF SENATOR TESTER

Senator TESTER. Thank you, Mr. Chairman, Ranking Member, for having this hearing. Most importantly, thank you for being here today, Mr. Mitnick, and thank you for your willingness to serve.

There is always a debate in Congress about national security and civil liberties and where that balance needs to be. Could you give me your philosophy as—and do not take too much time—as concisely as you can on where you value each of those? Is one more important than the other?

Mr. MITNICK. Senator, that is a critical question, and I think they are both critical issues. And it is important to strike that balance.

The mission of the Department is, of course, to safeguard the American people and our homeland and our values, but at the same time, we have to do that in a way that—if I am confirmed, that respects privacy and legal rights of Americans. And that balance has to be struck.

Senator TESTER. So let me give you an example. It has been a few years ago now. There was license plate reader technology that ICE was planning to expand, and I thought that there was a potential for some overstepping by the Federal Government on our civil liberties. And so I fought it until the Department engaged with the DHS Privacy Office and the Office of Civil Rights and Civil Liberties.

Are you familiar with those two offices, first of all, DHS's Privacy Office and the Office of Civil Rights and Civil Liberties?

Mr. MITNICK. Yes, Senator, I am familiar with them.

Senator TESTER. And would it be your intent—let me ask it this way. What do you believe the roles of those two offices are in regards to your position?

Mr. MITNICK. I believe those offices have critical roles in vetting the actions of the Department to ensure that all of the actions of the Department comply with privacy laws, civil rights, and civil liberties, and if I am confirmed, I will ensure that the Office of the General Counsel coordinates closely with the Chief Privacy Officer and the head of the Office of Civil Rights and Civil Liberties to carry out that vetting. And I will ensure that their views are taken into account.

Senator TESTER. And what happens if your boss says, "John, you are way out of bounds here. We do not agree with you. We do not think"—on either side, by the way, on the national security side or the civil liberties side. What is your response going to be?

Mr. MITNICK. Senator, throughout my 28 years of practicing law, I have encountered occasionally situations in which there was lack of complete agreement, shall we say, between my superiors and me, and in all of those situations I was able to resolve those by dealing with the issue objectively and reasonably. And usually, an accommodation or a mutually acceptable resolution can be found.

I can envision the situation that might need to be elevated at some time, but usually, at every point in my career when I have had one of those situations, I have been able to resolve them.

Senator TESTER. All right. So this is an important job, your role as General Counsel. The decisions that, well, the U.S. Customs and Border Protection (CBP) makes at ports of entry (POE), for example, and others have the ability to affect the law. Do you believe that there is legal training for the DHS employees?

And I know that you are limited in this position, although I did not read your vita to find out if you had ultimate familiarity with the Department. So you can tell me now. Do you believe the training for DHS employees at this moment in time is right?

Mr. MITNICK. Senator, I do not have access to all of the information about training that goes on within the Department at this point. I have not been there since 2004.

If I am confirmed, I would look forward to working with my colleagues in the Office of the General Counsel and the Acting Secretary and the other senior leaders to survey the types of training that are provided and to ensure that they are adequate.

Senator TESTER. Would you see it in your role to do an assessment of the employees across the components of DHS to make a determination whether they are properly trained in areas of legal matters?

Mr. MITNICK. Yes. And that is what I had in mind in what I just mentioned.

Senator TESTER. Yep.

Mr. MITNICK. And I think that is a critical role of the Office of the General Counsel, and one thing that facilitates that role is that virtually all of the attorneys in the entire Department, including those in the operational components, report up to the General Counsel, so that provides the opportunity for the General Counsel to ensure that the proper legal guidance is pushed out through all of those elements.

Senator TESTER. And I think that from my perspective and I get the impression from your perspective, too, it is a critically important component because you can have the best of intentions, and

the folks on the ground, if they do not know the legal parameters which they work under, could overstep them pretty quickly.

Mr. MITNICK. I think that is absolutely critical, and it is a critical part of the role of the General Counsel. And if I am confirmed, I am going to focus very intently on that role.

Senator TESTER. Well, I appreciate your willingness to serve. I can tell you, it is getting back to the first question, the question of civil liberties versus national security it is tough. But the truth is, in your position, if you understand that and you are willing to analyze and apply that analysis to the situations, I think we will be fine.

Thank you. Thank you for your willingness to serve.

And by the way, Hadley, I hope you have some great stories to tell your classes this afternoon. You will have them riveted, I am sure. [Laughter.]

Mr. MITNICK. Thank you, Senator.

Senator TESTER. Thank you.

Senator LANKFORD. Mr. Mitnick, let me continue on the line of questioning that Senator Tester had on civil liberties. Let us talk about some of the things that have come up specifically on this issue.

One of them is personal information for travelers at ports of entry. There has been some conversations about individuals that are crossing into the United States, what access the United States should have to—whether it be cell phones, personal information of an American citizen versus a person that is traveling into the country that is not an American citizen. Do you have a general perspective on how we balance out the civil liberties and protecting the Nation there, any kind of personal information or especially a cell phone or a device?

Mr. MITNICK. Senator, that is a critical issue. I appreciate you raising it, and Customs and Border Protection has very broad authority, as does U.S. Immigration and Customs Enforcement (ICE), in enforcing the law at the borders, vetting people and property coming into the United States, and of course, with the advent of technology, it is possible to bring an awful lot of information in, in a very small package.

My understanding is that the authority is fairly broad, but it is, of course, critical to ensure that any searches of devices respect the privacy rights of Americans and also civil rights and civil liberties and things like attorney-client privilege. I know that the various bar associations have raised concerns about privileged information on those devices.

So, if confirmed, I look forward to taking a close look at the operational protocols and the training provided to the CBP and ICE officers at the border to ensure that privacy and civil liberties are addressed appropriately.

Senator LANKFORD. OK. Yes. I would just tell you that in an oversight area, we will come back and ask questions about that because the unique rights and privileges for Americans to be secure in their persons, papers, houses, and effects is a constitutionally protected right, and we want to make sure that we can continue to abide by that basic constitutional right protection for Americans as they travel back and forth across the border.

Talking about borders, in 2006, the Secure Fences Act was passed. That started a process of putting about 650 miles of fence on our Southern Border. Of all of that area, there is a lot of land acquisition as well. 334 cases were filed against the Federal Government on that. 243 of those have been resolved in an average time of 3.6 years. The remaining cases are still pending for an average of 8.5 years. Help me understand how you will advise DHS because if there will be additional areas, whether that be tethered drones, technology, roads to access, or areas where there will be fence or vehicular blocks that will be there, all of those are going to require land acquisitions along the border. Help me understand how you will advise them to keep DHS out of lengthy lawsuits, if at all possible, so we can actually have a secure border and not lengthy lawsuits.

Mr. MITNICK. My understanding is that the Office of the General Counsel is involved in the exercise of eminent domain with regard to the building of infrastructure at the border, including the fence, and as a general matter, I think that the power of eminent domain is one of the most potentially intrusive powers that the Federal Government and other governments have. And it needs to be exercised judiciously, and it seems to me that it ought to be targeted.

So if I am confirmed, one thing I would do in my role as General Counsel is try to ensure that the impact on private landowners is minimized, to the extent possible, and hopefully, that would reduce the amount of time needed to work out the acquisition of the various property rights.

Senator LANKFORD. Yes. It does not help for us to be able to pass a bill dealing with security if the way that it is implemented creates so many lawsuits that you actually cannot get it done and we actually do not have real security. So that will be one of the things we will trust that you will stay engaged on and will help DHS as they work through the process.

Two other quick questions that I want to be able to have, and then I want to be able to recognize Senator Peters.

The Federal Emergency Management Agency (FEMA) in the 1990s was instructed by Congress to allow not-for-profits to also be engaged in emergency disaster relief, so zoos, museums, whatever it may be, nonprofits, were allowed to be able to do that. At that time, FEMA determined that they would not engage with houses of worship or any religious institution, even if it was a nonprofit.

Now, the law just states "nonprofits," but it has been redefined to say "unless you are a church or a synagogue or a mosque," and then you cannot apply for it, which is very ironic because in most disaster situations, those community locations that are also places of worship become the place for clothing and food distribution and Red Cross shelters and all those things. But they are not eligible at the end of it for emergency assistance from FEMA.

The law does not prohibit that. It just says nonprofits. It has just been reinterpreted in a way by succeeding FEMA folks and by General Counsels to say we want to prohibit that.

Then along came the Supreme Court. In the Trinity Lutheran case, earlier this year, they said in a 7-to-2 decision that the government cannot discriminate against a location simply because it

is a religious location for any kind of benefit. That if the benefit is open to all, it is truly open to all.

So my question to you is they are going to have to reexamine this and to be able to determine if a church, a synagogue, or a mosque that was destroyed in a hurricane or in a wildfire is also open to emergency disaster relief or not.

I am not asking you to tell me everything about your opinion on that, but this will probably land on your desk pretty quickly because, as you have probably seen in the papers, there are a few disasters that are going on right now. Help me determine how you are going to work through that process with them.

Mr. MITNICK. Senator, I appreciate that question. It is a very important issue and one that I recall coming up occasionally when I was in the White House Counsel's Office. I was there for a little over 3 years, and all of the Stafford Act emergency and major disaster declarations came through me when they came over from FEMA after coming from the Governors. And so I have some familiarity with that.

I am aware, though, from that experience that houses of worship have been some of the most active participants in providing disaster assistance, and if I am confirmed, I look forward to working with the very capable attorneys at FEMA to address that issue.

Senator LANKFORD. Yes. We look forward to that resolution being a clear resolution, consistent with the original law that was passed in the 1990s and with the Supreme Court case that has already come up, with Trinity Lutheran.

One quick thing on REAL ID, there are a lot of States that are waiting on waiver decisions. This is one of those things that is sitting out there. That a lot of States are working through the REAL ID process. That some of them have worked very hard to be able to accomplish it. Some of them have not worked as hard, but all of them are interested to be able to know what waiver authorities will be given and the timing that those things will occur from multiple States around the country.

I would only say to you, as you are giving counsel on the waivers to the Secretary and other individuals, however the decision has to be made on how to do a waiver and what that would be, the earlier those decisions can be made the better. It creates a great deal of uncertainty in States as they wait until the last minute to be able to get an answer, and so counsel at the last second is not as helpful as counsel a month ahead. And I am fully aware that sitting up here from Congress, we are the last people to be able to complain to someone about waiting until the last moment. I am fully aware of the irony of that conversation, but where it can be controlled, it would be helpful to be able to get decisions earlier rather than later on any of those waivers on REAL ID.

Mr. MITNICK. Senator, I am very sensitive to that issue. I know that a lot of those extensions are expiring imminently, and then there is a date looming out there very soon, I believe January 22nd or thereabouts, 2018, at which time those secure IDs that comply with the Act would have to be used to access Federal facilities and airports.

So I am aware of the time pressure there, and if I am confirmed in time to address that issue, I commit to you that I will devote my efforts to that.

Senator LANKFORD. That would be very helpful.

Senator PETERS. Thank you, Chairman Lankford.

Again, Mr. Mitnick, thank you for your willingness to serve, and I appreciated the opportunity to spend some time with you in my office as well prior to this hearing.

Mr. Mitnick, do you believe that the DHS should use partisan political considerations as a basis for deciding how to respond to inquiries or requests for information from Members of Congress?

Mr. MITNICK. Senator, I think that, in general, it is incumbent upon the officials and employees of the Department of Homeland Security to cooperate with Congress and to respond to requests for information in the context of congressional oversight.

That said, there are some exceptions to that, like executive privilege, which is the President's to invoke, and also there is occasionally, to my understanding, a need to prioritize responses because the Department has, of course, limited personnel and resources.

But I do not think that partisan concerns should apply to the response to congressional oversight requests.

Senator PETERS. So would you commit to respond in a timely manner to all congressional inquiries and requests for information from Members of Congress, including requests from Members in the Minority?

Mr. MITNICK. Senator, I do commit to working cooperatively with individual Members of Congress, including Members in the Minority, to respond to requests.

As I mentioned, there could be exceptions to that, such as executive privilege, and also there is often a need to prioritize.

So it might be possible in many instances to comply with deadlines that are applied—in other instances, we might need to work cooperatively with the requesting Member to work out a schedule, but I certainly commit to working with all Members to satisfy their requests.

Senator PETERS. Well, you have brought up prioritization a few times in your answer. How would you prioritize congressional inquiries? What is that priority? If you could elaborate, please?

Mr. MITNICK. Senator, if confirmed, first and foremost, I would work with the Acting Secretary and the other senior leaders of the Department and also including the Office of Legislative Affairs to work cooperatively with Members.

I think, at first, there should be an effort to work with the Congress to work out a comprehensive prioritization if there are conflicting requests and ask the Members to tell us which are the highest-priority requests and which are maybe a little bit lower priority.

If the Department is put in the situation—

Senator PETERS. So what Members would you ask to prioritize? Who would make that decision here in Congress as to how you would prioritize?

Mr. MITNICK. Senator, if confirmed, I envision that we would work with all of the Members who are seeking documents and information.

Senator PETERS. Well, every Member will want to be prioritized at the top. So how do you make that decision?

Mr. MITNICK. Well, then if my first solution to that problem does not work, if confirmed, the Department will be left to make some sort of decision about prioritization, but hopefully, we will be able to arrive at some sort of understanding or resolution working directly with the Members.

Senator PETERS. Are you aware of any White House instruction that DHS should refuse to respond to inquiries or requests for information from certain Members or certain parties within Congress?

Mr. MITNICK. Senator, I am not aware of any direction or guidance in that regard, and in fact, I am aware that there has been correspondence between Senator Grassley and Mr. Don McGahn, the White House Counsel, relatively recently regarding the Office of Legal Counsel opinion that was issued on May 1, 2017. I have read that correspondence, and I did not see anything like that in there.

Senator PETERS. Do you commit to reviewing any outstanding congressional inquiries and requests for information and then reporting back to this Committee on the status of those?

Mr. MITNICK. Actually, I should note that that letter did not come from the White House Counsel. I believe it came from Mr. Marc Short, now that I recall.

Senator PETERS. OK.

Mr. MITNICK. So it was correspondence from Senator Grassley and responded to by Mr. Short, I think. I am sorry.

Senator PETERS. So the question is, do you commit to reviewing any outstanding congressional inquiries and requests for information and then reporting back to this Committee on the status of those requests, if confirmed?

Mr. MITNICK. Senator, I commit, if confirmed, to work cooperatively with all Members of Congress to satisfy their requests for documents and information.

Senator PETERS. As you know, the DHS has the largest law enforcement force in the country, and if confirmed, you would certainly play a very critical role in reviewing the guidance that is put out to the agency, across the entire agency. What would you do to ensure that there is consistent guidance made that makes it out, actually makes it out to the field to the men and women who are serving?

We are hearing that guidance that may be coming from Washington is not getting to the field, and that the different field offices interpret and follow guidance differently, which is certainly unacceptable, and I assume that is something you would want to pick up and I would love to hear your comments as to how you are going to make sure that it is done in a proper and consistent manner.

Mr. MITNICK. Senator, not being at the Department now, I am not aware of those specific problems, but as I mentioned in my opening statement, I think that it is a critical tool of the General Counsel that nearly all of the attorneys in the Department, including those at the operational components, report up to the General Counsel. And that provides a very important opportunity to ensure that not only sound, timely, and actionable advice is pushed out to

all of the employees of the Department, to ensure that the Department complies with applicable law, but also provides an opportunity to ensure consistency of legal advice throughout the Department.

So I would work with my colleagues who are actually embedded in the operational components of the Department to ensure that the advice is not only consistent, but it is also provided directly to the very dedicated people who work at DHS who need it in their day-to-day operation.

Senator PETERS. Mr. Mitnick, do you believe that religion should be a basis for a U.S. counterterrorism or law enforcement policy, particularly as it relates to the targeting of individuals with ancestry from Muslim-majority countries?

Mr. MITNICK. Senator, I do not believe that one's personal religious beliefs should be considered in that context, and so I think that our approach to counterterrorism should be based on assessment of risk.

Senator PETERS. So how do you reconcile your belief with the travel ban Executive Orders that have been put forward?

Mr. MITNICK. Senator, I have read the Executive Orders that you mention, including the one, the proclamation, that was issued by the President on September 24th, I believe, and I do not see any reference in those orders to the religious background of anyone who might be affected by those orders. They are directed at specific countries based on specific objective security criteria.

Senator PETERS. Well, what would you do if you found a policy to be inconsistent with current law and inconsistent with the belief that you just expressed to me?

Mr. MITNICK. Senator, it would depend, I believe, where the policy originated. With regard to Presidential guidance, a Presidential policy, I would hope to be—if confirmed—a participant in the Administration's policy development and implementation process, with which I am very familiar from my time in the White House, and participate in that to ensure that issues like that are addressed in the policy development process.

If it is something within the Department alone, if I am confirmed as General Counsel, I would hope that I would have some direct impact in giving advice on how those policies should be crafted and contoured in order to avoid legal issues.

Senator PETERS. Thank you.

Senator LANKFORD. Senator Hassan.

OPENING STATEMENT OF SENATOR HASSAN

Senator HASSAN. Thank you, Mr. Chairman.

Good morning, Mr. Mitnick. It is nice to see you again, and I note, among others, that there is a particularly young family member in the audience, and I just wanted to say good morning, and thank you very much for sharing. I was not here earlier. Daughter? Father?

Mr. MITNICK. Yes. This is my daughter, Hadley.

Senator HASSAN. OK. So thank you for sharing your dad with the rest of us. We are very grateful he is willing to serve.

I wanted to ask you, Mr. Mitnick, about a topic that you and I discussed when we met in my office, which is domestic terrorism.

We have been struggling, it seems to me, with what constitutes domestic terrorism versus international terrorism. If an American on American soil cites a thought or ideology that originated outside of the United States but acts inside the United States, for instance, is that domestic or international terrorism? So do you have a definition, a working definition, of what distinguishes the two?

Mr. MITNICK. Senator, that is a very important issue, and I believe it was one that was discussed at the hearing last Wednesday—

Senator HASSAN. Yes.

Mr. MITNICK [continuing]. Which involved Acting Secretary Duke—

Senator HASSAN. Right.

Mr. MITNICK [continuing]. And the Federal Bureau of Investigation (FBI) Director Christopher Wray.¹

I would defer to Director Wray, of course, on that issue, and I believe that, notwithstanding the definitional issue, his view was that there are more than adequate authorities for the FBI to go after domestic terrorists under current law.

Senator HASSAN. Well, but I think that kind of begs the question whether the Department of Homeland Security has a role to play in countering efforts by domestic terrorists to launch terrorist attacks in the United States. Do you think it does?

Mr. MITNICK. Senator, I do believe that the Department has a very critical role to play, and for example, I am aware that the Department has a countering violent extremism (CVE) effort that is fairly robust. I think the funding is relatively limited but certainly could be expanded.

Senator HASSAN. In your view, is it just a funding issue, or are there other limitations to the Department's role in stopping domestic terrorism?

Mr. MITNICK. Senator, not being at the Department now, I am not aware of any deficiency in legal authorities that the Department has with regard to addressing domestic terrorism within the scope of its mission and its role.

Senator HASSAN. Right.

Mr. MITNICK. And if I am confirmed, I certainly would be very interested in becoming more knowledgeable on that and addressing any possible deficiencies.

Senator HASSAN. Well, I think one of the things that we began to talk about last week with Director Wray was the issue that there is not actually a criminal offense of domestic terrorism the way there is international terrorism, and it does seem to me that this is squarely within the Department's area and scope of responsibility and should be a part of its jurisdiction. Domestic terror threats are considerable, and we have seen a growing presence in our country.

So I would urge you, should you be confirmed, to be looking at this issue with the Department's leadership because I think we want to make sure that Americans are safe from both domestic and international terrorism, and that the Department, with all of its resources and expertise—in concert, obviously, with law enforcement,

¹ The hearing referenced is HSGAC's September 27, 2017, hearing "Threats to the Homeland".

which is the way you operate, anyway—could be taking on a greater role, and I think needs to be paying more attention to the issue of domestic terrorism. So I would look forward to working with you on that.

Mr. MITNICK. Senator, I appreciate that, and I look forward to working with you as well.

My understanding is that there is very robust information sharing going on between the FBI and DHS and other law enforcement entities and the intelligence community (IC).

My understanding is also, though, that the Homeland Security Act specifically accords the law enforcement function with regard to terrorism to the Justice Department and the FBI. So, within those constraints, I certainly look forward to working with you if I am confirmed to address that issue.

Senator HASSAN. Well, and I would look forward to hearing from you if, as you identify those constraints or others, there are ways that if we all think it makes sense, we could change some of those constraints. And I think we are at a critical juncture. I think we need to be doing more on the domestic terrorism front. I think we can do that without compromising our efforts on the international terrorism front, but we should always be looking for ways to improve and strengthen, and so I look forward to getting your best assessment, should you be confirmed, about ways we can make sure the Department has not only the resources it needs but the authority it needs.

Thank you.

Mr. MITNICK. Thank you.

Senator HASSAN. And I yield the rest of my time.

Senator LANKFORD. Thank you. Senator Harris.

OPENING STATEMENT OF SENATOR HARRIS

Senator HARRIS. Thank you. Good morning.

Mr. MITNICK. Good morning.

Senator HARRIS. As you know, the Deferred Action for Childhood Arrivals (DACA) program was created over 5 years ago, and it has allowed thousands upon hundreds of thousands of hardworking young people to have status that defers their deportation, if they have submitted information about themselves and undergone an analysis and an investigation about who they are, their background, are they productive, have they committed a crime or not. And if they clear that vetting, then they received DACA status.

You are familiar with the DACA program, I take it?

Mr. MITNICK. Yes, Senator.

Senator HARRIS. OK. And you are also aware, then, that on September 5th, without any administrative notice, the Attorney General (AG) of the United States indicated that the DACA program was being terminated?

Mr. MITNICK. I am aware that it was rescinded and it is being wound down. Yes, Senator.

Senator HARRIS. What do you believe is the significance of the announcement, given that there was no administrative notice?

Mr. MITNICK. Senator, not being at the Department now, I do not have access to the information that was considered and the legal advice that was given with regard to, for example, whether the Ad-

ministrative Procedure Act (APA) or other requirements were applicable or not.

I am familiar with what was announced publicly, however.

Senator HARRIS. Those of the DACA recipients that their DACA status was set to expire by March 5th were given 30 days to renew, to apply for renewal of their status.

I am asking you this question now as a colleague, a professional in the law. Part of our responsibility, especially as public lawyers serving the public interest and with the public trust, is to concern ourselves with fairness. Would you agree with that?

Mr. MITNICK. I believe it is incumbent upon any public servant and particularly an attorney to act with fairness.

Senator HARRIS. So these young people were given 30 days to renew their status, and within that 30 days, they would then, in order to comply with the renewal process, have to gather a lot of documentation and come up with \$495. And I am sure you know Federal minimum wage is \$7.25 an hour, so it is a lot of money.

What is your perspective on the fairness of that, and do you have any perspective on whether or not it would be fair to extend that deadline to give those young people more time to comply with the requirement that they renew their status?

Mr. MITNICK. Senator, not being at the Department now, I do not know all of the constraints and all of the issues that were considered by the leadership, and it would be inappropriate, I think, for me to express an opinion or second-guess the leadership of the Department, particularly the Acting Secretary, in the decision that was made.

I do understand that the Attorney General sent a letter to the Acting Secretary, I believe, on September 4th expressing his opinion that the DACA program, as initiated in 2012, is unconstitutional, and so I do appreciate the fact that the Department's leadership was operating under some significant constraints in this regard.

But not being there, I do not know all of the details.

Senator HARRIS. And I appreciate your point.

The point of my question is to also just have some sense of what you believe your role would be, if confirmed, and what your role and responsibility would be to advise your client on what is not only legally, but based on black-letter law, appropriate and constitutional, but also what is fair in terms of the Administration of the great powers of that Department.

So, for example, another related issue is that Acting Secretary Duke was here recently and testified that the DACA grantees would need to renew their status by October 5th but were never individually notified of the change in the policy. So there were press conferences, but there was never any direct notification to DACA recipients that the program would be terminated and they had one month to renew their status. What is your perspective on the fairness of that process?

Mr. MITNICK. Senator, let me say that my personal belief is that the DACA recipients are among the most sympathetic of those who are in this country without legal status, and I believe that my role as an attorney transcends black-letter law, as you said, although a distinction must be drawn. In the private sector, I am accus-

tomed to distinguishing between legal issues and business issues——

Senator HARRIS. Sure.

Mr. MITNICK [continuing]. And the analog to that in government would be a distinction between legal issues and policy issues, and if I am confirmed, I would hope to have a seat at the table with the other senior leaders of the Department and express my views not only on black-letter law but also on fairness and compassion and acting as public servants.

Again, I do not know the details or the specific constraints under which the Department was operating in this regard, so I cannot really express an opinion about the specific issue you raised.

Senator HARRIS. I appreciate your perspective and, in particular, your understanding of the responsibility we all have to look at the broad picture and not just the technical component of the work that we do, so thank you for that.

And then I have a question about the responsibilities which you would undertake, if confirmed, which are, quote, “protecting the rights and liberties of any Americans who come into contact with the Department.”

And increased enforcement and border operations by ICE and CBP have led to growing reports of racial profiling, particularly of Latinos. What specifically would you do to address implicit bias and racial profiling where and when it exists?

Mr. MITNICK. Senator, I think it is absolutely critical that the Department of Homeland Security carry out all of its functions in strict compliance with privacy rights and other rights of Americans, including civil liberties, and if I am confirmed, I look forward to reviewing all of the guidance, including protocols and operational legal guidance provided to the operational components, including specifically CBP and ICE and particularly those who have direct contact with the American people on a daily basis to ensure that all of their actions and activities comply with those rights.

Senator HARRIS. And I just have one more question.

Mr. MITNICK. And by the way I think it is critical that I work with the Chief Privacy Officer and the head of the Office of Civil Rights and Civil Liberties in that regard.

Senator HARRIS. I agree.

And one more question which is, will you commit to this Committee that, if confirmed, you will specifically take a look at the best practices around training law enforcement on implicit bias and procedural justice, as the FBI has done that, for example, as another Federal agency, and commit that you will urge that all of the members of the Department and particularly those in the field be trained on implicit bias and procedural justice?

Mr. MITNICK. Senator, if confirmed, I will look at that policy and others and ensure to the extent I can within my authority as General Counsel of the Department that proper guidance is given and that proper training is given on that guidance, but of course, I will have to work with the heads of those components and the other senior leaders in that regard.

Senator HARRIS. Thank you.

Senator LANKFORD. Thanks, Senator Harris.

I have a few more questions to be able to wrap up, and then we will give you an opportunity to make any final statements, if you choose to make those.

Will you cooperate with the Inspectors General (IGs) as they work with each individual area of DHS and to make sure that they have access to the information that they need access to?

Mr. MITNICK. Senator, I look forward, if confirmed, to working cooperatively with the Inspector General in the Department. I recognize that the Inspector General has a critical role in audits and investigations under the Inspector General Act and also the relevant provisions of the Homeland Security Act of 2002, and so I would look forward to working with the Inspector General in a collegial and cooperative manner and, within the scope of my authority as General Counsel, ensure that the Inspector General has all of the resources needed to accomplish the Inspector General's function.

I am aware that there is existing guidance within the Department that I think was issued by the Secretary back in 2008 that provides for cooperation and provision of documents and information to the Inspector General. So, if confirmed, I look forward to looking at that, seeing if maybe it needs to be updated, and working with the Inspector General in that regard.

Senator LANKFORD. Terrific. Yes. We are on the same team here, and what I do not want to have is the situation where the Inspector General is seen as an adversarial role. We are all trying to deal with all issues there, whether it be whistleblower protection or whether that be waste in government or whether that be fraud within an entity. I never want to see one of our agencies try to protect themselves by blocking out the Inspector General from their investigation.

DHS has a very unique role in our Federal Government in working with States for voting and to be able to help those States in their voting. One of the key criteria, though, is States run their voting systems, not the Federal Government. Any counsel that you would give initially or any concerns that you have to make sure that States are protected to be able to make decisions that they have to make as States without the Federal Government trying to overstep its clear boundaries there?

Mr. MITNICK. Senator, that is a critical issue. I appreciate you raising it, and I am acutely aware that the elections in 2018 are looming and there is a need to be proactive, if I am confirmed.

My understanding, Senator, is that the election infrastructure—although as you said, it is primarily the responsibility of State and local governments—was added as an element of critical infrastructure by the Department, and that the Department, therefore, is ready, willing, and able, to my understanding, to work with State and local governments who request assistance, particularly in addressing possible cybersecurity threats that could compromise the election system and election technology.

So if I am confirmed, I would look forward to working with Acting Secretary Duke and other senior leaders in the Department to ensure that that assistance is lawfully provided.

Senator LANKFORD. Yes. We look forward to that as well. Cybersecurity is also an area that is squarely within DHS. It is

also one of the thorniest issues of the law because everywhere where you get into the leading edge of technology, law and policy tend to lag behind on it. Again, this goes back to one of our earlier questions about Americans being secure in their houses, papers, persons, and effects. It is a basic constitutional protection, but you get into the area of cybersecurity, and attacks both from outside the United States and within the United States, is a very critical issue for us in the long term in just our economic security as a nation as well as our private information and security of that.

Any insight that you can give us into your legal mindset on cybersecurity issues and any boundaries that you could lay out in front of us?

Mr. MITNICK. Senator, my personal opinion is that cybersecurity is one of the greatest threats that we face as a Nation, and it is a critical role of the Department of Homeland Security.

I was involved in cybersecurity work when I worked in the White House, including crafting Presidential direction. Of course, that was 10 or 11 years ago. So, if confirmed, I look forward to becoming more knowledgeable about exactly what the Department's activities are right now.

I do know that the Department has a critical role in safeguarding the dot-gov domain and has very critical authorities there and has regulatory authority in that regard, and I understand that the Department has an absolutely critical role in working with the private sector and State and local governments on information sharing with regard to cybersecurity. And my understanding is there is liability protection that Congress enacted, which also is assisting now in the information sharing back and forth between the Department and the private sector, but I look forward to working on that issue, if I am confirmed.

Senator LANKFORD. Great. Terrific.

Senator Harris, do you have any final questions?

Senator HARRIS. No, thank you.

Senator LANKFORD. I have one final question on this, and it is extremely important. I saw in your background, you are a baseball fan. So Indians or Dodgers in the World Series? Who do you call? Are they both there and if they are there, or if you have another option who is in the World Series and who wins it?

Senator HARRIS. The Giants. [Laughter.]

Senator LANKFORD. You can pick another option, if you choose to. I know this is the toughest question of the day.

Mr. MITNICK. Well, being in Washington and having lived here for 16 years, I have been transformed into a Nationals fan. So I do not want to say anything that might prejudice—not that my statements would have any bearing on their success in the post season, but I do not want to say anything that would have a negative impact in any way on the Nationals and their prospects.

I have to admit that I was very impressed by that run that the Dodgers went on this season until they came back down to earth, although they still ended up pretty well. It looked to me like they were going to set a record for number of wins in a regular season, but they are a formidable team.

Senator LANKFORD. Pretty remarkable.

Mr. MITNICK. I should mention the Indians had a pretty good run.

Senator LANKFORD. Yes, they had a pretty good run as well.

Mr. MITNICK. Yes.

Senator LANKFORD. Any other final statements that you want to make before this Committee?

Mr. MITNICK. Senator, I do not have any prepared remarks, but I do want to thank you for considering my nomination and the rest of the distinguished Members of this Committee and also Ranking Member Peters for being here today and meeting with me yesterday.

I have enjoyed this process, and if confirmed, I look forward to working cooperatively with all of the Members of this Committee and other Members of Congress.

Senator LANKFORD. Terrific. Yes. Thank you for making yourself available for both meeting with me and the office and just going through so many questions with some of the other Members on the dais as well and to be able to go through those things in our office, in that setting, so we can go into greater depth on these issues.

We do need a strong counsel there, and so look forward to having a good, strong counsel in that spot because we need decisions. We need them made rapidly but accurately as well through the process.

Just to be able to make this final closing statement, the nominee has made financial disclosures and provided responses to biographical and prehearing questions submitted by the Committee. Without objection, this information will be made part of the hearing record, with the exception of the financial data, which are on file and available for public inspection in the Committee offices.¹

The hearing record will remain open until noon tomorrow, October the 4th, for the submission of statements and questions for the record. However, if Members wish to receive responses to their questions from Mr. Mitnick prior to the Committee vote tomorrow, they must submit questions for the record by 5 p.m. today.

Thank you again, Mr. Mitnick, for your work and for being here and going through this process.

The hearing is adjourned.

[Whereupon, at 10:31 a.m., the Committee was adjourned.]

¹ The information of Mr. Mitnick appears in the Appendix on page 23.

A P P E N D I X

Statement of John Marshall Mitnick

**Nominee for General Counsel
U.S. Department of Homeland Security**

Before the

U.S. Senate Committee on Homeland Security and Governmental Affairs

October 3, 2017

Chairman Lankford, Ranking Member Peters, and distinguished Members of the Committee, it is an honor for me to appear before you today as the President's nominee to be the General Counsel of the Department of Homeland Security (DHS). I am grateful to the President and Acting Secretary Duke for the trust and confidence that they have placed in me, and I thank the Committee and its staff for moving forward expeditiously on my nomination.

I would also like to recognize and thank the members of my family who are here today. My wonderful daughter Hadley, who is taking a few hours off from kindergarten this morning, is sitting behind me. Hadley is the light of my life, and I feel very fortunate that she can share this event with me and see how our government functions. She should have quite a story to share with her classmates and teachers when she returns to school this afternoon.

I am grateful to my mother, Dr. Barbara Mitnick, who is also here. She instilled in me a love of learning early on when, after graduating from Cornell University and having children, she resumed her education, ultimately earning a master's degree and a doctorate in the history of American art and architecture. She went on to a distinguished career in scholarship, teaching, and public service, which continues to this day. She will undoubtedly give us a memorable tour of the Capitol after this hearing.

I regret that my father, Howard Mitnick, cannot be here today. He passed away suddenly in March 2012, and I miss his love and wise counsel every day. He was a lawyer's lawyer, an astute lifelong student of business, economics, and public policy, and a true patriot, and I know that this would have been a proud day for him. I carry his memory with me in everything that I do.

At this time, I also want to remember my grandparents, Sydney and Nan Jacobs, and Bernard and Sophie Mitnick. All but my grandfather Syd were immigrants to our great country early in their lives, and Syd was the son of immigrants. Their stories of leaving their homelands to seek freedom and opportunity in America and working hard to succeed here, while typical in many ways of a large number of my fellow citizens, are constant inspirations to me. They raised families, became pillars of their communities, and built strong foundations for the generations to come. There was an extraordinary and awe-inspiring generation, and I consider myself very

fortunate to have known all of them well. I will always cherish the memory of the day in June 1993 when my grandfather Syd, who was also an attorney, at the age of 88 realized a dream that he had since I was born by moving my admission to the U.S. Supreme Court Bar in open court.

If confirmed, it will be a privilege and an honor for me to return to DHS and work side-by-side with the Department's more than 240,000 dedicated professionals to safeguard the American people, our homeland, and our values. I say "return" because I was there at the beginning; as a detailee from the Department of Justice in the DHS Transition Planning Office, I was one of a small group of attorneys tasked with supporting the establishment of DHS in late 2002 and early 2003. I went on to serve as the Department's first Associate General Counsel for Science and Technology until I moved to the White House in 2004, where I served successively as Deputy Counsel of the Homeland Security Council and as Associate Counsel to the President with primary responsibility for all homeland security legal matters.

Although it has been many years since I served in DHS, and I have admired from afar the great strides made by the Department, I am generally aware of the ongoing challenges of integrating and coordinating its many disparate elements. If confirmed, I intend to build upon the good work of my predecessors to ensure that the more than 1,800 talented and dedicated attorneys in the Office of the General Counsel provide sound, timely, actionable, and consistent legal advice throughout the Department while also ensuring the protection of the privacy and other legal rights of Americans. In doing so, I will employ my 28 years of experience practicing law at the highest levels in government and the private sector, which has included supervising senior attorneys and serving as an integral member of senior leadership teams that managed organizations ranging from several hundred to more than 9,000 employees.

I also understand that oversight activities are essential functions of the Congress that are necessary for the exercise of its constitutional powers, and are also vital to the proper functioning of the executive branch. Therefore, if confirmed, I will look forward to working with you and your staffs in a cooperative manner.

Chairman Lankford, Ranking Member Peters, and distinguished Members of the Committee, thank you again for this opportunity to appear before you, and I would be pleased to answer any questions.

**HSGAC BIOGRAPHICAL QUESTIONS FOR
EXECUTIVE NOMINEES**

REDACTED**1. Basic Biographical Information**

Please provide the following information.

<i>Position to Which You Have Been Nominated</i>	
Name of Position	Date of Nomination
General Counsel, Department of Homeland Security	August 2, 2017

<i>Current Legal Name</i>			
First Name	Middle Name	Last Name	Suffix
John	Marshall	Mitnick	

<i>Addresses</i>					
Residential Address (do not include street address)			Office Address (include street address)		
			Street: 214 Massachusetts Avenue, NE		
City: McLean	State: VA	Zip: 22101	City: Washington	State: DC	Zip: 20002

<i>Other Names Used - N/A</i>

<i>Birth Year and Place</i>	
Year of Birth (Do not include month and day.)	Place of Birth
1962	East Orange, NJ

<i>Marital Status</i>					
Check All That Describe Your Current Situation:					
Never Married	Married	Separated	Annulled	Divorced	Widowed
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

<i>Spouse's Name — N/A (current spouse only)</i>
--

<i>Spouse's Other Names Used — N/A (current spouse only)</i>
--

<i>Children's Names (if over 18) — N/A</i>
--

2. Education

List all post-secondary schools attended.

<u>Name of School</u>	<u>Type of School</u> (vocational/technical/trade school, college/university/military college, correspondence/distance/extension/online school)	<u>Date Began School</u> (month/year) (check box if estimate)	<u>Date Ended School</u> (month/year) (check box if estimate) (check "present" box if still in school)	<u>Degree</u>	<u>Date Awarded</u>
University of Virginia School of Law	University	8/1984 ^{Est} <input type="checkbox"/>	5/1988 ^{Est Present} <input type="checkbox"/> <input type="checkbox"/>	J.D.	5/1988
Oxford University	University	10/1985 ^{Est} <input type="checkbox"/>	6/1987 ^{Est Present} <input type="checkbox"/> <input type="checkbox"/>	B.A.	6/1987
Emory University	University	8/1980 ^{Est} <input type="checkbox"/>	5/1984 ^{Est Present} <input type="checkbox"/> <input type="checkbox"/>	B.A.	5/1984

3. Employment

(A) List all of your employment activities, including unemployment and self-employment. If the employment activity was military duty, list separate employment activity periods to show each change of military duty station. Do not list employment before your 18th birthday unless to provide a minimum of two years of employment history.

Type of Employment (Active Military Duty Station, National Guard/Reserve, USPHS Commissioned Corps, Other Federal employment, State Government (Non- Federal Employment), Self- employment, Unemployment, Federal Contractor, Non- Government Employment (excluding self-employment), Other)	Name of Your Employer/ Assigned Duty Station	Most Recent Position Title/Rank	Location (City and State only)	Date Employment Began (month/year) (check box if estimate)	Date Employment Ended (month/year) (check box if estimate) (check "present" box if still employed)
Non-Government Employment	The Heritage Foundation	Senior VP, General Counsel, and Secretary	Washin gton, DC	3/2014 <input type="checkbox"/> Est	Present <input type="checkbox"/> Est
Unemployment	N/A	N/A	N/A	4/2013 <input type="checkbox"/> Est	3/2014 <input type="checkbox"/> Est
Non-Government Employment	Raytheon Company/Raythe on Technical Services Company LLC	VP, General Counsel, and Secretary	Reston and Sterling , VA	11/2007 <input type="checkbox"/> Est	4/2013 <input type="checkbox"/> Est
Other Federal Employment	The White House	Associate Counsel to the President	Washin gton, DC	8/2004 <input type="checkbox"/> Est	10/2007 <input type="checkbox"/> Est
Other Federal Employment	U.S. Department of Homeland Security	Associate General Counsel for Science and Technology	Washin gton, DC	10/2003 <input type="checkbox"/> Est	8/2004 <input type="checkbox"/> Est
Other Federal Employment	U.S. Department of Justice (Detailed to U.S. Department of Homeland Security (including Transition Planning Office)	Counsel to Assistant Attorney General, Antitrust Division	Washin gton, DC	9/2001 <input type="checkbox"/> Est	10/2003 <input type="checkbox"/> Est

	from 11/2002 to 10/2003)				
Non-Government Employment	Kilpatrick Townsend & Stockton LLP ¹	Partner	Atlanta, GA	10/1988 ^{Est} □	8/2001 ^{Est} □
Non-Government Employment	MedSafe Technologies L.L.C.	President	Atlanta, GA	9/1997 ^{Est} ✓	8/2001 ^{Est} □
Non-Government Employment	Georgia State University College of Law	Adjunct Professor of Law	Atlanta, GA	8/1993 ^{Est} ✓	5/1996 ^{Est} ✓
Non-Government Employment	University of Virginia School of Law	Research Assistant	Charlottesville, VA	8/1987 ^{Est} ✓	5/1988 ^{Est} ✓
Non-Government Employment	Kilpatrick Townsend & Stockton LLP	Summer Associate	Atlanta, GA	6/1987 ^{Est} ✓	8/1987 ^{Est} ✓
Non-Government Employment	Condon & Forsyth	Summer Associate	New York, NY	8/1986 ^{Est} ✓	9/1986 ^{Est} ✓
Non-Government Employment	Kilpatrick Townsend & Stockton LLP	Summer Associate	Atlanta, GA	6/1986 ^{Est} ✓	8/1986 ^{Est} ✓
Non-Government Employment	Condon & Forsyth	Summer Associate	New York, NY	5/1985 ^{Est} ✓	8/1985 ^{Est} ✓
Non-Government Employment	Emory University	Resident Advisor	Atlanta, GA	8/1983 ^{Est} □	5/1984 ^{Est} □
Non-Government Employment	Pressure Concrete and Grouting	project assistant	South Orange, NJ	5/1982 ^{Est} ✓	8/1982 ^{Est} ✓
Non-Government Employment	Pressure Concrete and Grouting	project assistant	South Orange, NJ	5/1981 ^{Est} ✓	8/1981 ^{Est} ✓
Non-Government Employment	Rosedale Manor Apartments	maintenance	Madison, NJ	6/1980 ^{Est} ✓	8/1980 ^{Est} ✓
Non-Government Employment	Roy Rogers	cook	Millburn, NJ	4/1980 ^{Est} ✓	6/1980 ^{Est} ✓

¹ This is the present name of the law firm.

(B) List any advisory, consultative, honorary or other part-time service or positions with federal, state, or local governments, not listed elsewhere.

None.

4. Potential Conflict of Interest

(A) Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Homeland Security's Designated Agency Ethics Official to identify any potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have signed and transmitted to the Department's Designated Agency Ethics Official, which has been provided to this Committee. I am not aware of any other potential conflicts of interest.

(B) Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity.

None.

5. Honors and Awards

List all scholarships, fellowships, honorary degrees, civilian service citations, military medals, academic or professional honors, honorary society memberships and any other special recognition for outstanding service or achievement.

B.A., History and Political Science, *summa cum laude*, Emory University, 1984

Phi Beta Kappa

Omicron Delta Kappa

Phi Alpha Theta

Pi Sigma Alpha

Mortar Board

6. Memberships

List all memberships that you have held in professional, social, business, fraternal, scholarly, civic, or charitable organizations in the last 10 years.

Unless relevant to your nomination, you do NOT need to include memberships in charitable organizations available to the public as a result of a tax deductible donation of \$1,000 or less, Parent-Teacher Associations or other organizations connected to schools attended by your children, athletic clubs or teams, automobile support organizations (such as AAA), discounts clubs (such as Groupon or Sam's Club), or affinity memberships/consumer clubs (such as frequent flyer memberships).

Name of Organization	Dates of Your Membership (You may approximate.)	Position(s) Held
State Bar of Georgia	10/1988 to present	Member
Association of Corporate Counsel	2014 to present	Member
Society for Corporate Governance	2014 to present	Member
Oxford and Cambridge Club	1988 to present	Member
Merton College Charitable Corporation	4/2012 to present	Member, Board of Trustees
Valaurum, Inc.	3/2016 to present	Member, Board of Directors
Valaurum, Inc.	7/2015 to 3/2016	Member, Board of Advisors
University of Virginia Law School Alumni Council	7/2017 to present	Member
The Federalist Society	1987 to present	Member

7. Political Activity

(A) Have you ever been a candidate for or been elected or appointed to a political office?

Yes.

Name of Office	Elected/Appointed/ Candidate Only	Year(s) Election Held or Appointment Made	Term of Service (if applicable)
Associate Counsel to the President, The White House	Appointed	2005	5/2005 to 10/2007
Deputy Counsel, Homeland Security Council, The White House	Appointed	2004	8/2004 to 5/2005
Associate General Counsel for Science and Technology, U.S. Department of Homeland Security	Appointed	2003	10/2003 to 8/2004
Counsel to Assistant Attorney General, Antitrust Division, U.S. Department of Justice (Detailed to U.S. Department of Homeland Security (including Transition Planning Office) from 11/2002 to 10/2003)	Appointed	2001	9/2001 to 10/2003
Member, Georgia State Senate, District 40	Candidate Only	2000	N/A
Member, United States House of Representatives, Georgia 4 th District	Candidate Only	1996	N/A

(B) List any offices held in or services rendered to a political party or election committee during the last ten years that you have not listed elsewhere.

Name of Party/Election Committee	Office/Services Rendered	Responsibilities	Dates of Service
Republican National Committee	election day volunteer	Answered calls from election officials	11/2008

(C) Itemize all individual political contributions of \$200 or more that you have made in the past five years to any individual, campaign organization, political party, political action committee, or similar entity. Please list each individual contribution and not the total amount contributed to the person or entity during the year.

Name of Recipient	Amount	Year of Contribution
Friends of Kelly Ayotte Inc.	\$225.00	2016
Portman for Senate	\$200.00	2016

Rand Paul for US Senate	\$201.60	2016
Donald J. Trump for President, Inc.	\$500.00	2016
George Allen for US Senate	\$500.00	2012
Romney for President, Inc.	\$1,000	2012
Romney Victory, Inc.	\$1,000	2012
Ted Cruz for Senate	\$200.00	2012

8. Publications and Speeches

(A) List the titles, publishers and dates of books, articles, reports or other published materials that you have written, including articles published on the Internet. Please provide the Committee with copies of all listed publications. In lieu of hard copies, electronic copies can be provided via e-mail or other digital format.

<u>Title</u>	<u>Publisher</u>	<u>Date(s) of Publication</u>
"An Absent-minded Clubhouse Signer"	teambaseballs.com website	7/4/2012
"New Record Price for a Team Baseball"	teambaseballs.com website	9/4/2011
"Prices and Valuation"	teambaseballs.com website	8/22/2010
"Signature Fading"	teambaseballs.com website	8/15/2010
"Modern Forgeries"	teambaseballs.com website	8/8/2010
"About the Book"	teambaseballs.com website	7/2010
<i>Team Baseballs: Artifacts of the Game</i> (co-authored)	Artifact Publishing	7/2010
"Constitutional Theory in the Liberal Tradition Versus the	<i>Emory Law Journal</i>	Summer 1989

Republican Ideal" (co-authored)		
"From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror"	<i>American Journal of Legal History</i>	7/1988
Various Music Reviews and Articles	<i>The Emory Wheel</i> and <i>The Cavalier Daily</i>	1983 to 1986

(B) List any formal speeches you have delivered during the last five years and provide the Committee with copies of those speeches relevant to the position for which you have been nominated. Include any testimony to Congress or any other legislative or administrative body. These items can be provided electronically via e-mail or other digital format.

None.

(C) List all speeches and testimony you have delivered in the past ten years, except for those the text of which you are providing to the Committee.

<u>Title</u>	<u>Place/Audience</u>	<u>Date(s) of Speech</u>
SAFETY Act Implementation (Panel Discussion)	Fifth Annual Homeland Security Law Institute, Washington, DC	3/2010
Business of Homeland Security: A Public & Private Sector Perspective on Procurement and Development of Homeland Security Technology & Services (Panel Discussion)	Fourth Annual Homeland Security Law Institute, Washington, DC	2/27/2009
The Private Sector and Security: Roles & Responsibilities (Panel Discussion)	Fourth Annual Homeland Security Law Institute, Washington, DC	2/26/2009
SAFETY Act (Panel Discussion)	Washington, DC (Sponsored by the Homeland Security & Defense Business Council)	10/28/2008

9. Criminal History

Since (and including) your 18th birthday, has any of the following happened?

- Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you? (Exclude citations involving traffic infractions where the fine was less than \$300 and did not include alcohol or drugs.) No.
- Have you been arrested by any police officer, sheriff, marshal or any other type of law enforcement official? No.
- Have you been charged, convicted, or sentenced of a crime in any court? No.
- Have you been or are you currently on probation or parole? No.
- Are you currently on trial or awaiting a trial on criminal charges? No.
- To your knowledge, have you ever been the subject or target of a federal, state or local criminal investigation? No.

If the answer to any of the questions above is yes, please answer the questions below for each criminal event (citation, arrest, investigation, etc.). If the event was an investigation, where the question below asks for information about the offense, please offer information about the offense under investigation (if known).

N/A

A) Date of offense:

a. Is this an estimate (Yes/No):

B) Description of the specific nature of the offense:

C) Did the offense involve any of the following?

- 1) Domestic violence or a crime of violence (such as battery or assault) against your child, dependent, cohabitant, spouse, former spouse, or someone with whom you share a child in common: **Yes / No**
- 2) Firearms or explosives: **Yes / No**
- 3) Alcohol or drugs: **Yes / No**

D) Location where the offense occurred (city, county, state, zip code, country):

E) Were you arrested, summoned, cited or did you receive a ticket to appear as a result of this offense by any police officer, sheriff, marshal or any other type of law enforcement official: **Yes / No**

1) Name of the law enforcement agency that arrested/cited/summoned you:

2) Location of the law enforcement agency (city, county, state, zip code, country):

F) As a result of this offense were you charged, convicted, currently awaiting trial, and/or ordered to appear in court in a criminal proceeding against you: **Yes / No**

1) If yes, provide the name of the court and the location of the court (city, county, state, zip code, country):

2) If yes, provide all the charges brought against you for this offense, and the outcome of each charged offense (such as found guilty, found not-guilty, charge dropped or "nolle pros," etc). If you were found guilty of or pleaded guilty to a lesser offense, list separately both the original charge and the lesser offense:

3) If no, provide explanation:

G) Were you sentenced as a result of this offense: **Yes / No**

H) Provide a description of the sentence:

I) Were you sentenced to imprisonment for a term exceeding one year: **Yes / No**

J) Were you incarcerated as a result of that sentence for not less than one year: **Yes / No**

K) If the conviction resulted in imprisonment, provide the dates that you actually were incarcerated:

L) If conviction resulted in probation or parole, provide the dates of probation or parole:

M) Are you currently on trial, awaiting a trial, or awaiting sentencing on criminal charges for this offense: **Yes / No**

N) Provide explanation:

10. Civil Litigation and Administrative or Legislative Proceedings

(A) Since (and including) your 18th birthday, have you been a party to any public record civil court action or administrative or legislative proceeding of any kind that resulted in (1) a finding of wrongdoing against you, or (2) a settlement agreement for you, or some other person or entity, to make a payment to settle allegations against you, or for you to take, or refrain from taking, some action. Do NOT include small claims proceedings.

In the following actions there was neither a finding of wrongdoing against me, nor any allegation against me, nor any settlement requiring me or any other person or entity to make a payment to settle an allegation against me. The following actions are listed solely because the referenced settlement requires me to take "some action" (mainly payments that are typical in such settlements).

<u>Date Claim/Suit Was Filed or Legislative Proceedings Began</u>	<u>Court Name</u>	<u>Name(s) of Principal Parties Involved in Action/Proceeding</u>	<u>Nature of Action/Proceeding</u>	<u>Results of Action/Proceeding</u>
9/2016	Fairfax County Circuit Court (VA)	John M. Mitnick, Carol Deane B. Mitnick	Divorce, including child custody, child support, spousal support, and division of marital property	Custody Order (joint legal custody and joint physical custody); all other issues settled in 7/2017.
7/2016	Fairfax County Circuit Court (VA)	John M. Mitnick, Carol Deane B. Mitnick	Separate Maintenance	Consolidated with the action filed 9/2016 (above)
4/2016	Fairfax County Juvenile and Domestic Relations District Court (VA)	John M. Mitnick, Carol Deane B. Mitnick	Child custody, visitation, support, and maintenance	Dismissed by agreement of the parties with a view to litigating the issues in the action filed 9/2016 (above)

(B) In addition to those listed above, have you or any business of which you were an officer, director or owner ever been involved as a party of interest in any administrative agency proceeding or civil litigation? Please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

<u>Date Claim/Suit Was Filed</u>	<u>Court Name</u>	<u>Name(s) of Principal Parties Involved in Action/Proceeding</u>	<u>Nature of Action/Proceeding</u>	<u>Results of Action/Proceeding</u>
1998	U.S. District Court, S.D. Indiana	Syringe Development Partners L.L.C. and MedSafe Technologies L.L.C. v. New Medical	Patent infringement	Settled

		Technology Inc. and NMT Group PLC		
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(C) For responses to the previous question, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

11. Breach of Professional Ethics

(A) Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, professional association, disciplinary committee, or other professional group? Exclude cases and proceedings already listed.

No.

(B) Have you ever been fired from a job, quit a job after being told you would be fired, left a job by mutual agreement following charges or allegations of misconduct, left a job by mutual agreement following notice of unsatisfactory performance, or received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of a security policy?

No.

12. Tax Compliance

(This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

REDACTED

13. Lobbying

In the past ten years, have you registered as a lobbyist? If so, please indicate the state, federal, or local bodies with which you have registered (e.g., House, Senate, California Secretary of State).

No.

14. Outside Positions

✓See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

15. Agreements or Arrangements

✓See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

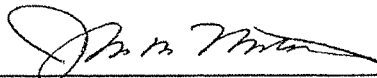
16. Additional Financial Data

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

SIGNATURE AND DATE

I hereby state that I have read the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.



JOHN M. MITNICK

This 17th day of August, 2017

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



REDACTED

August 8, 2017

The Honorable Ron Johnson
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by John M. Mitnick, who has been nominated by President Trump for the position of General Counsel, Department of Homeland Security.

We have reviewed the report and have obtained advice from the agency concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is an ethics agreement outlining the actions that the nominee will undertake to avoid conflicts of interest. Unless a date for compliance is indicated in the ethics agreement, the nominee must fully comply within three months of confirmation with any action specified in the ethics agreement.

Based thereon, we believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

DAVID APOL

Digitally signed by DAVID APOL
DN: c=US, o=U.S. Government, ou=Office of
Government Ethics, cn=DAVID APOL,
o=D, o=U.S. Government, ou=Office of
Government Ethics, cn=DAVID APOL
Date: 2017.08.08 18:46:56 -0400

David J. Apol

Acting Director and General Counsel

Enclosures

REDACTED



August 3, 2017

Joseph Maher
Designated Agency Ethics Official
Department of Homeland Security
Washington, D.C. 20528-0485

Dear Mr. Maher,

The purpose of this letter is to describe the steps I will take to avoid any actual or apparent conflict of interest in the event I am confirmed for and appointed to the position of General Counsel, Department of Homeland Security.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me:¹ any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as an officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

If confirmed by the United States Senate, prior to assuming the duties of General Counsel, Department of Homeland Security, I will resign from my positions with The Heritage Foundation and Merton College Charitable Corporation, and as Trustee of my Family Trust. For a period of one year after my resignation from each of these entities, I will not participate personally and substantially in any particular matter involving specific parties in which I know any of these entities is a party or represents a party, unless I am first authorized to participate pursuant to 5 C.F.R. § 2635.502(d).

The Heritage Foundation may pay me a *pro rata* bonus that covers only the period of calendar year 2017 prior to my resignation. The amount of this bonus will be calculated and paid to me by The Heritage Foundation prior to assuming the duties of General Counsel, and I will forfeit any amounts not paid to me prior to assuming the duties of General Counsel. If I receive the bonus, I will not participate personally and substantially in any particular matter involving specific parties in which I know The Heritage Foundation is a party or represents a party for a

¹ Subject to applicable U.S. Office of Government Ethics and other federal government legal and policy guidance.

period of two years from the date on which I receive the bonus, unless I first receive a written waiver pursuant to 5 C.F.R. § 2635.503(c). During my appointment to the position of General Counsel, I will not receive any payments from The Heritage Foundation and will not have any other right or claim for further payments from The Heritage Foundation.

As a former executive with Raytheon Company, I will continue to participate in the Raytheon Company deferred compensation plan. During my appointment to the position of General Counsel, for as long as I continue to participate in such deferred compensation plan, as required by 18 U.S.C. § 208(a) I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Raytheon Company to provide the foregoing contractual benefit, unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption pursuant to 18 U.S.C. § 208(b)(2).

Upon confirmation, I will resign from my position with Valaurum, Inc. Because I will continue to hold stock and stock options in Valaurum, Inc., during my appointment to the position of General Counsel, as required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Valaurum, Inc., unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1).

I am the sole shareholder of Team Baseballs, Inc., which has occasionally acquired and sold items. During my appointment to the position of General Counsel, the corporation will not acquire new items. If I continue to maintain the Team Baseballs, Inc., website domain name and home page, I will delete the pages from the website on which books and other items are sold or on which there are endorsements pertaining to any other parties or references to my expert commentary. I will delete or disable any navigation links from the home page, and I will add a statement to the home page that the website is inactive. During my appointment to the position of General Counsel, the corporation will be inactive and I will not perform any services for the corporation, except that the corporation will comply with any and all requirements involving corporate and legal filings, preparation and filing of tax returns, and payment of taxes and fees, and I may participate in such activities. During my appointment to the position of General Counsel, as required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Team Baseballs, Inc., unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1).

I am the sole shareholder of Southeast Property Development Corporation ("SPDC"), which holds one undeveloped parcel of land in Georgia. During my appointment to the position of General Counsel, SPDC will be inactive and will not acquire new property, and I will not perform any services for SPDC or represent SPDC in any way, except that SPDC may (1) sell the land, and (2) comply with any and all requirements involving corporate and legal filings.

preparation and filing of tax returns, and payment of taxes and fees; and I may participate in such activities. Another officer of SPDC will address, on behalf of SPDC, any and all zoning, permitted use, tax assessment, and eminent domain matters that arise relating to the land. I may receive investment income from SPDC. During my appointment to the position of General Counsel, as required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the SPDC unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1).

During my appointment to the position of General Counsel, I will not actively participate in the management of or provide other services to Rosedale Manor Associates, L.L.P. ("Rosedale"), and I will grant a proxy for voting my partnership interest on issues relating to the management of the partnership. I may receive investment income from Rosedale. During my appointment to the position of General Counsel, as required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Rosedale, unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1).

I may receive compensation for sales of my book, *Team Baseballs: Artifacts of the Game*, from Amazon and from sales that my co-author's company makes through conferences, events, and other marketing efforts. I will not personally participate in sales of my book. During my appointment to the position of General Counsel, I will not participate personally and substantially in any particular matter involving specific parties in which I know my co-author is a party or represents a party, unless I am first authorized to participate pursuant to 5 C.F.R. § 2635.502(d).

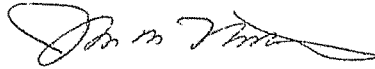
If I have a managed account or otherwise use the services of an investment professional during my appointment to the position of General Counsel, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the exemption at 5 C.F.R. § 2640.201(a), obligations of the United States, or municipal bonds.

I will meet in person with you during the first week of my service in the position of General Counsel in order to complete the initial ethics briefing required under 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I will also document my compliance with this ethics agreement by notifying you in writing when I have completed the steps described in this ethics agreement.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Finally, I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order No. 13770), and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

Sincerely,

A handwritten signature in black ink, appearing to read "John M. Mitnick", with a stylized, flowing script.

John M. Mitnick

**U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-hearing Questionnaire
For the Nomination of John Marshall Mitnick to be
General Counsel, Department of Homeland Security**

I. Nomination Process and Conflicts of Interest

1. Did the President, White House officials, or any Department of Homeland Security (DHS or the Department) officials give you specific reasons about why you were nominated to be the next DHS General Counsel, and if so, what were they?

No, but it was implicit in the conversations that my experience as an attorney, and particularly in DHS and the White House, was a factor in the decision to nominate me to be the next DHS General Counsel.

2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.

No.

3. Have you made any commitments with respect to the policies and principles you will attempt to implement as General Counsel? If so, what are they, and to whom were the commitments made?

No.

4. Are you aware of any business relationship, dealing, or financial transaction that could result in a possible conflict of interest for you or the appearance of a conflict of interest? If so, please explain what procedures you will use to recuse yourself or otherwise address the conflict. And if you will recuse yourself, explain how you will ensure your responsibilities are not affected by your recusal.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Homeland Security's Designated Agency Ethics Official to identify any potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have signed and transmitted to the Department's Designated Agency Ethics Official, which has been provided to the Committee. I am not aware of any other potential conflicts of interest. If it is ever necessary to recuse myself from involvement in a particular matter, I will assign full responsibility for such matter to another senior attorney in the Department's Office of the General Counsel.

II. Background of the Nominee

5. What specific background, experience, and attributes qualify you to be General Counsel?

My specific background, experience, and attributes that qualify me to be General Counsel including the following:

- *I am a member in good standing of the State Bar of Georgia, and I have been admitted to practice before numerous Georgia and federal courts, including the Supreme Court of the United States.*
- *I have practiced law for 28 years at the highest levels, including over five years as a senior federal government attorney in DHS and the White House; nine years as a corporate general counsel and corporate secretary in the private sector (including over five years of experience with federal government contracts); and nearly 13 years as an associate and a partner in a major international law firm, assisting clients with business transactions.*
- *I have extensive experience with homeland security legal matters, including having served in the following positions: (1) one of a small group of attorneys in the Transition Planning Office for DHS, which had the principal responsibility for standing up the Department in late 2002 and early 2003; (2) DHS's first Associate General Counsel for Science and Technology and an integral member of the first leadership team of DHS's Office of the General Counsel (2003 to 2004); (3) Deputy Counsel of the Homeland Security Council in the White House (2004 to 2005); and (4) Associate Counsel to the President with primary responsibility for all homeland security legal matters in the White House (2005 to 2007).*
- *My dedication to public service and the mission of DHS, as demonstrated by my previous federal government service.*
- *Strong legal acumen and sound judgment, as evidenced by my successful performance in each position in which I have served in my career, as well as my academic record.*

6. Please describe:

a. Your leadership and management style.

My leadership and management style is to set an example of integrity, excellence, trustworthiness, appropriate transparency and candor, accessibility, humility, and dedication to the mission of the organization while promoting a collegial, collaborative, mutually-supportive environment in which (1) excellence is expected, (2) a tone of trust in and respect for colleagues and overriding good will is maintained, (3) context is set to bolster organizational goals and allow individuals to take responsibility and excel free from micro-managing, (4) critical thinking, discussion, and respectful disagreement are welcome and encouraged while preserving the management structure, (5) constructive feedback is frequently given, and personnel are

encouraged to ask for it at any time, (6) mentoring is encouraged and practiced at all levels, (7) personal agendas, office politics, and favoritism are not tolerated, and (8) successes are celebrated, and the primary response to failure is not blame, but rather addressing the problem and implementing a robust lessons-learned process with appropriate follow-up.

b. Your experience managing personnel.

I have managed personnel at each stage of my career, including other attorneys, paralegals, administrative assistants, and, at Raytheon Company, my division's entire Environmental, Health and Safety organization. In all of the organizations in which I have worked, I have had responsibility for hiring, day-to-day management, performance evaluations, and professional development.

c. What is the largest number of people that have worked under you?

The largest number of people that have reported to me (directly or indirectly) in any previous position was 30 (at Raytheon Company), including nine senior attorneys. I have, however, served in several senior executive positions, in the federal government and in the private sector, in which I was an integral member of senior leadership teams that managed organizations ranging from several hundred to more than 9,000 employees.

7. How might your previous work as Associate Counsel to the White House and Deputy Counsel of the Homeland Security Council influence your role as General Counsel, if confirmed?

In my previous positions in the White House Counsel's Office as Associate Counsel to the President (2005 to 2007) and Deputy Counsel of the Homeland Security Council (2004 to 2005), I gained the following experience which, if I am confirmed, should influence and enhance my performance as General Counsel:

- *Experience in addressing substantive homeland security legal issues, including those relating to the following areas: border and transportation security and immigration; cybersecurity; critical infrastructure protection; prevention, preparedness, response, and recovery relating to terrorist attacks, major disasters, and other emergencies; defense against chemical, biological, radiological, nuclear, and explosive threats; and continuity of government. If confirmed, that experience will be beneficial to me in carrying out the responsibilities of the General Counsel.*
- *Experience as a daily participant in the policy development and coordination process led by White House staff, including preparing for, attending, and participating in policy coordination, deputies, and principals committee meetings and drafting dozens of executive orders, presidential directives, and other presidential policy documents. If confirmed, that experience will assist me in helping to ensure that DHS is an engaged and effective participant in this Administration's policy development and coordination process.*

- Experience in drafting, reviewing, commenting on, revising, and clearing homeland security-related regulations in the process administered by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA). If confirmed, that experience will be beneficial to me in managing the Department's rulemaking processes.
- Experience in mediating disagreements regarding legal issues between and among federal departments and agencies. If confirmed, that experience will be valuable in working with my counterparts at other departments and agencies to advance the mission of DHS.

8. Please describe any previous experience you have working with the federal regulatory and rule-making process.

As Associate General Counsel for Science and Technology at DHS (2003 to 2004), I was principally responsible for the regulations implementing the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act), including drafting and publishing for public comment the Notice of Proposed Rulemaking, considering all public comments received, drafting and promulgating the Interim Final Rule, and advising the Secretary of Homeland Security and the Under Secretary for Science and Technology with regard to all of the foregoing. I was also substantially involved in drafting and finalizing the SAFETY Act Final Rule in the Department and in the White House Counsel's Office. In my capacity as Associate General Counsel for Science and Technology, I was also the principal legal adviser to DHS's Office of SAFETY Act Implementation. As Deputy Counsel of the Homeland Security Council and as Associate Counsel to the President (2004 to 2007), I reviewed and cleared all homeland security regulations in the process administered by OIRA.

III. Role of the General Counsel at DHS

9. What do you believe is the role of General Counsel at DHS?

As the chief legal officer of DHS, the primary role of the General Counsel is to provide sound, timely, and actionable legal advice to the Secretary, other DHS senior leaders, and the Department as a whole, ensuring that all activities of the Department fully comply with all applicable legal requirements, including laws protecting the privacy and other legal rights of Americans. The General Counsel is also responsible for leading and managing the approximately 1,800 attorneys who serve in the Department's Office of the General Counsel. The General Counsel is also uniquely situated to enhance cooperation and coordination among the Department's eight operational components and its support components.

10. If confirmed, what will be the immediate highest priority issues that you expect to address? What longer-term goals would you like to achieve?

If confirmed, I look forward to working with the Secretary of Homeland Security, other DHS senior leaders, and the Office of the General Counsel to identify and prioritize issues that should be addressed immediately and to develop longer-term goals. Among the latter, I would like to build upon the work of my predecessors in enhancing the coordination, integration, and

professional development of the attorneys and other staff in the Office of the General Counsel and ensuring the high quality and consistency of legal advice throughout the Department.

11. What role do you believe the General Counsel should have in reviewing executive orders or other administration policies that impact DHS?

I believe that the General Counsel should be an active participant in the executive branch's policy development and coordination process, either by participating directly in that process (when appropriate) or by advising and staffing other DHS senior leaders in the course of their participation in that process.

12. What do you believe is the appropriate relationship between the DHS Office of General Counsel and component legal departments?

I believe that the existing structure of the DHS Office of the General Counsel, in which all component legal departments are part of the Office of the General Counsel and all component attorneys report to the General Counsel (except as otherwise required by statute in the case of the U.S. Secret Service), reflects the appropriate relationship between the DHS Office of the General Counsel and component legal departments. That structure was originally implemented when the Department was established in 2003, and it was designed to ensure the quality and consistency of legal advice throughout the Department.

13. Do you believe it is important to ensure consistency of legal positions across the Department? If so, what steps would you take to ensure that consistency?

I believe that it is important to ensure the consistency of legal positions and advice throughout the Department. If confirmed, I would employ the structure of the Office of the General Counsel, in which all component attorneys (except as otherwise required by statute in the case of the U.S. Secret Service) report to the General Counsel and not to the heads of the components, combined with the subject matter expertise of the nine legal divisions within the headquarters office of the Office of the General Counsel and robust processes of internal communication, collaboration, coordination, accountability, and professional development, in order to ensure that consistency.

IV. Policy Questions

14. Do you believe that DHS has sufficient legal authority to enable it to interact effectively with other agencies, particularly when its mission overlaps with other agencies or requires DHS to coordinate federal efforts across agencies? Please explain.

If confirmed, I will work with the Secretary of Homeland Security and other DHS senior leaders to conduct a comprehensive review of DHS legal authorities in order to determine whether the Department has sufficient authorities to interact effectively with other agencies in accomplishing its mission, and, if not, I will develop a set of recommendations to address the deficiency.

15. On what basis, if any, do you believe the Department may be entitled to withhold information or documents from Congress? Please explain.

I believe that oversight activities are essential functions of the Congress that are necessary for the fulfillment of its constitutional powers, and are also vital to the proper functioning of the executive branch. In general, except in the case of a valid claim of executive privilege, I believe that the Department should respond in a timely and cooperative manner to all requests for information or documents from Congress.

16. Under what circumstances, if any, do you believe an official or employee of the Department may decline to testify before a congressional committee? Please explain.

In general, I believe that testifying before congressional committees when invited is one of the duties of officials and employees of the Department. In light of the importance of Congress's legislative and oversight responsibilities, I believe that it would be a very rare circumstance when the Department would decline to make one of its officials or employees available to testify. One circumstance in which an official or employee might decline to testify would be if the mere appearance of the witness would materially compromise or prejudice an ongoing law enforcement investigation or a vital national security interest. Another circumstance would be an exercise of the constitutional right against self-incrimination, although that right is possessed and must be asserted by the individual official or employee and would not be asserted by the Department.

17. What criteria should the Office of General Counsel use to decide whether and how to respond to requests from Congress for documents, information, or testimony?

In general, the Office of the General Counsel should cooperate with congressional oversight activities and respond in a timely manner to requests from Congress for documents, information, or testimony. The Office's ability to be responsive will be affected, however, by such factors as the breadth and specificity of the requests at issue; the degree to which responsive information exists and is accessible in a responsive format within a reasonable timeframe; the ability of requestors to prioritize what may be multiple, competing requests; the need to address the protection of classified information or truly privileged communications; and the capacity of the Office to respond to requests and the possible need for the Office to prioritize responses. Also, to the extent that classified or other sensitive information is requested, appropriate security measures should be taken to protect the information and intelligence sources and methods.

18. What do you believe are the Department's responsibilities for complying with requests from the Government Accountability Office (GAO)?

In general, I believe that the Department should comply in a timely manner with document requests from GAO in accordance with GAO's statutory rights of access to federal agency documents, subject to the specific exceptions set forth by statute.

- a. Do you believe there are lawful reasons to withhold documents from GAO, and if so, what are they?

It is my understanding that GAO's otherwise broad statutory access to documents is subject to certain statutory exceptions, including the following: (1) documents relating to activities that the President designates as foreign intelligence or counterintelligence activities; (2) documents that are specifically exempted from disclosure to the Comptroller General by statute; and (3) documents the disclosure of which "reasonably could be expected to impair substantially the operations of the Government" and which could be withheld under either 5 U.S.C. § 552(b)(5) (certain deliberative process documents) or (b)(7) (certain law enforcement documents), as certified by the President or the Director of the Office of Management and Budget.

- b. As General Counsel, how will you ensure that the relationship with GAO is a constructive one?

If confirmed, as General Counsel I will work to ensure that the relationship with GAO is a constructive one by fostering a mutually cooperative relationship and continuing dialogue between DHS and GAO and following through on commitments to respond appropriately to GAO requests.

19. What do you believe are the Department's responsibilities for complying with request from the Office of Special Counsel (OSC)?

In general, I believe that the Department should comply in a timely manner with requests from OSC in accordance with relevant federal statutes such as 5 U.S.C. § 1212 and relevant federal regulations such as 5 C.F.R. § 5.4.

- a. Do you believe there are lawful reasons to withhold documents from OSC, and if so, what are they?

I am aware that departments and agencies, including DHS, have withheld documents from OSC based on attorney-client privilege. I am also aware that OSC has taken the position that attorney-client privilege is not a valid basis on which a department or agency may withhold documents or other information from OSC. At this time, I do not have access to the documents and information that I would need to review in order to respond fully to this question.

- b. Testifying before the House Committee on Oversight and Government Reform in March 2017, Acting TSA Administrator, Huban Gowadia, cited DHS guidance as the reason for TSA's withholding of documents requested by OSC on the basis of attorney-client privilege. DHS staff recently suggested to Committee staff that withholding documents from OSC on the basis of a common-law privilege is an executive branch policy. What specific case law, written guidance, memoranda, recommendations, policies, or other materials do you believe allow DHS to withhold documents from OSC on the basis of a common-law privilege? Please produce any such documents to the Committee.

At this time, I do not have access to the documents and information that I would need to review in order to respond to this question. If confirmed, at the request of the Committee, I will undertake a review of this matter.

- c. As General Counsel, how will you ensure that the relationship with OSC is a constructive one?

If confirmed, as General Counsel I will work to ensure that the relationship with OSC is a constructive one by fostering a mutually cooperative relationship and continuing dialogue between DHS and OSC and following through on commitments to respond appropriately to OSC requests.

- 20. What do you believe are the Department's responsibilities for complying with requests from the DHS Office of Inspector General (OIG)?

In general, I believe that the Department should comply in a timely manner with requests from OIG in accordance with the Inspector General Act of 1978, as amended, and the provisions of the Homeland Security Act of 2002 relating to OIG.

- a. What do you see specifically as the General Counsel's role in complying with OIG requests?

I see the General Counsel's role in complying with OIG requests as including the following: (1) helping to ensure that all DHS officials and employees cooperate fully with OIG audits and investigations; and (2) supporting and working cooperatively with the separate group of attorneys who I understand are assigned to support OIG.

- b. Do you believe there are lawful reasons to withhold documents from the OIG, and if so, what are they?

I understand that there is specific guidance within the Department, originally issued in 2008, relating to the obligations of DHS employees to cooperate with OIG, which directs employees to consult with the Office of the General Counsel if requested documents are classified, deliberative, or otherwise sensitive. At this time, I do not have access to the documents and information that I would need to review in order to respond fully to this question.

- c. As General Counsel, how will you ensure that the relationship with DHS OIG is a constructive one?

If confirmed, as General Counsel I will work to ensure that the relationship with DHS OIG is a constructive one by fostering a collegial and mutually cooperative and supportive relationship and continuing dialogue between the two components, and also helping to ensure that all DHS officials and employees cooperate fully with OIG audits and investigations.

21. If confirmed, do you commit to ensuring that the DHS OIG has all the documents and information it needs to perform its job?

Yes, within the scope of my authority as General Counsel.

22. Whistleblowers continue to be an important way Congress, agencies and inspectors general receive complaints regarding waste, fraud and abuse.

a. What role do you believe the Office of General Counsel should play in protecting whistleblowers at DHS?

I believe that the Office of the General Counsel should protect whistleblowers at DHS by advising DHS officials and employees of their obligation to comply with applicable law, including the prohibitions on retaliation against whistleblowers.

b. If confirmed, how will you assist DHS in implementing policies that encourage employees to bring constructive suggestions forward without the fear of reprisal?

If confirmed, I will assist DHS in implementing policies that encourage employees to bring constructive suggestions forward without the fear of reprisal by encouraging the use of complaint or suggestion hotlines, advising fellow DHS officials and employees not to engage in any reprisal against those who bring forward constructive suggestions, and setting an example within the Office of the General Counsel by encouraging attorneys and support personnel to bring forward such suggestions.

c. If confirmed, do you commit without reservation to work to ensure that any whistleblower within DHS does not face retaliation?

If confirmed, I commit without reservation to work to ensure that any whistleblower within DHS does not face retaliation in accordance with the protections provided by applicable federal law.

d. If confirmed, do you commit without reservation to take all appropriate action if notified about potential whistleblower retaliation?

Yes.

23. The Freedom of Information Act (FOIA) plays a critical role in ensuring the integrity of our government and the vitality of our democracy. If confirmed, what will you do to ensure that the Department, and all of its component agencies, properly and efficiently comply with FOIA?

My understanding is that the DHS Privacy Office has principal responsibility for DHS's compliance with FOIA. If confirmed, I will work with the Department's Chief Privacy Officer in order to ensure that the Department and all of its components properly and efficiently comply with FOIA. I will also ensure that attorneys within the Office of the General Counsel provide sound, timely, and actionable legal advice regarding FOIA to the Privacy Office.

24. How should the Office of General Counsel work with and support the missions of the DHS Privacy Office and the Office of Civil Rights and Civil Liberties?

I believe that the Office of the General Counsel should work with and support the missions of the DHS Privacy Office and Office of Civil Rights and Civil Liberties by (1) providing sound, timely, and actionable legal advice as requested by such Offices, and (2) ensuring that such Offices are appropriately consulted regarding DHS products such as guidance, protocols, and implementation memoranda.

25. If confirmed, how will you ensure DHS components execute border searches in compliance with the law?

If confirmed, I will review all legal guidance issued within the Department relating to the execution of border searches and ensure that they contain appropriate guidance for performing such searches in accordance with applicable law.

26. If confirmed, what role will the Office of General Counsel play in the resolution of official complaints made by the public and other entities against those components?

If confirmed, I envision that the Office of the General Counsel will be a full participant in the resolution of all official complaints made by public and other entities against a DHS component when there is a legal issue implicated by the complaint.

27. If confirmed, how will you ensure that our frontline Customs and Border Protection personnel have the tools they need to work effectively – such as advanced border surveillance technology – while simultaneously respecting the law and safeguarding the privacy of Americans?

If confirmed, although as General Counsel I will not have authority over procurement decisions relating to border surveillance technology, I will ensure that the Office of the General Counsel performs a thorough legal analysis of the use of such technology, particularly with regard to compliance with the privacy and other legal rights of Americans, and issues sound, timely, and actionable legal guidance to Customs and Border Protection relating thereto.

28. The Secure Fence Act provides DHS with a broad authority to waive all “legal requirements” in order to construct fencing along the border. What legal requirements should be waived in order to construct fencing along the border? What analysis should be used to determine whether a legal requirement needs to be waived?

At this time, I do not have access to the documents and information that I would need to review in order to respond to this question. If confirmed, at the request of the Committee, I will undertake a review of this matter.

V. Relations with Congress

29. Do you agree without reservation to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

Yes.

30. Do you agree without reservation to make any subordinate official or employee available to appear and testify before, or provide information to, any duly constituted committee of Congress if you are confirmed?

Yes.

31. Do you agree without reservation to comply fully, completely, and promptly to any request for documents, communications, or any other agency material or information from any duly constituted committee of the Congress if you are confirmed?

Yes.

VI. Assistance

32. Are these answers your own? Have you consulted with DHS or any other interested parties? If so, please indicate which entities.

Yes, these answers are my own. I have consulted with DHS personnel regarding factual and historical information required to provide responses to certain questions.

**Minority
Supplemental Pre-hearing Questionnaire
For the Nomination of John Marshall Mitnick to be
General Counsel, Department of Homeland Security**

I. Background of Nominee

1. Do you seek out dissenting views and how do you encourage constructive critical dialogue with subordinates?

I encourage subordinates to engage in critical thinking, robust discussion, and respectful dissent (provided that the management structure is preserved), making it clear that such activities will not have adverse consequences. I believe that decision-making processes are most effective when dissenting views are encouraged and fully considered.

2. Please give examples of times in your career when you disagreed with your superiors and aggressively advocated your position. Were you ever successful?

Although I am prevented by the attorney-client privilege from providing details in responding to this question, throughout my career I have sought to fulfill my professional obligation to provide sound legal advice in pursuit of compliance with the law and in the best interest of the organization of which I was a part, notwithstanding pressures relating to profitability or expediency or concern for my compensation or job tenure. I have also always believed that, in order to perform my role as counsel properly, it is sometimes necessary to "speak truth to power" and be willing to deliver advice that I know will not be welcome. As a result, occasionally I have respectfully but firmly disagreed with my superiors and presented the substantive basis of my position, and fortunately in each instance an acceptable resolution was achieved. Those occasions were exceptional, however, and I have been privileged in my career to have superiors who were ethical and fully committed to advancing the best interest of the organization while complying with applicable law.

3. Please list and describe examples of when you made politically difficult choices that you thought were in the best interest of the country?

Although I am prevented by the attorney-client privilege from providing details in responding to this question, during my previous service in the Department of Justice, DHS, and the White House, the best interest of the country was always my paramount concern.

4. What would you consider your greatest successes as a leader?

Although I am prevented by the attorney-client privilege from providing details in responding to this question, I consider my greatest successes as leader to have been (1) ensuring that individual employees of the organizations for which I worked were treated fairly and with respect, and (2) ensuring that the best interest of the organization for which I worked, whether in the federal government or in the private sector, was pursued notwithstanding any parochial concerns of individuals within the organization.

II. Policy Questions

5. Please describe any previous experience—in the public or private sector—with handling whistleblower complaints, and what steps you took to ensure those individuals did not face retaliation and that their claims were thoroughly investigated?

Although I am prevented by the attorney-client privilege from providing details in responding to this question, in the course of my career I have been involved in a few situations involving individual whistleblowers, and in each instance I ensured that the individuals' claims were thoroughly investigated, issued clear guidance to other personnel in the organization that there should be no retaliation against the individual, and monitored the situation for an appropriate period of time in order to guard against such retaliation.

6. How will you ensure that whistleblower complaints are properly investigated?

If confirmed, I will ensure that whistleblower complaints are properly investigated by referring such complaints to the appropriate officials, such as the DHS Office of the Inspector General or the Office of Special Counsel, pursuant to applicable statutes and departmental directives. I will also advise DHS officials and employees to comply with the protections against retaliation afforded to whistleblowers by federal law.

7. If confirmed, what steps will you take to ensure that you are appropriately consulted on Administration policies and practices that effect the mission and operations of DHS?

If confirmed, I intend to develop cordial and cooperative working relationships with White House staff and my counterparts at other departments and agencies in order to ensure that I am appropriately consulted on and included in the Administration's policy development and coordination process.

8. As General Counsel, what steps will you take to ensure that products such as guidance, implementation memoranda, and protocols are reviewed and approved by the DHS Office of General Counsel. What steps, if any, will you take to review current products that are relied upon by DHS components?

If confirmed, in order to ensure that products such as guidance, implementation memoranda, and protocols are reviewed and approved by the DHS Office of the General Counsel, I will ensure that existing departmental directives requiring the approval of such documents by the Office are fully implemented and followed. I will also undertake a review of other departmental directives to ascertain whether approval by the Office has been inappropriately omitted from any of them, and will use my best efforts to remedy any such omission. I will also canvass the DHS Deputy and Associate General Counsels and the heads of the component legal departments in order to identify any guidance, implementation memoranda, and protocols that are in need of review and approval by the Office, and I will act promptly to carry out the review and approval of any such documents that are so identified.

9. Will you commit to ensuring that the Office of General Counsel has sufficient personnel to respond to congressional document requests and the facilitate the internal review process to ensure the timely delivery of materials to Congress?

Yes, subject to the availability of appropriations and in compliance with federal government hiring authorities.

10. In the course of responding to a congressional request, will you commit to providing documents and opportunities for briefings simultaneously to both the Chairman and the Ranking Member?

Yes.

11. If confirmed, do you commit to ensuring that DHS Privacy Office and the Office of Civil Rights and Civil Liberties are appropriately consulted on the review of DHS products such as guidance, protocols, and implementation memoranda?

If confirmed, within the scope of my authority as General Counsel, I commit to ensuring that the DHS Privacy Office and the Office of Civil Rights and Civil Liberties are appropriately consulted on the review of DHS products such as guidance, protocols, and implementation memoranda.

12. What role should the General Counsel play in developing and reviewing guidance, training and protocols issued to frontline agents and officers regarding the proper use of border search authority?

I believe that the Office of the General Counsel should review all guidance, training, and protocols relating to the execution of border searches in order to ensure that they comply with applicable law.

13. What role should the Office of General Counsel play in ensuring that DHS components properly notify and engage with state, local, tribal, and community groups impacted by their missions?

If there is a legal obligation requiring notification of or engagement with state, local, or tribal governments or community groups impacted by the mission of a DHS component, the Office of the General Counsel should issue sound, timely, and actionable legal guidance to such component regarding such obligation.

14. If confirmed, do you commit to ensuring that DHS components comply with any and all judicial decisions and orders?

If confirmed, I will use my best efforts to ensure that DHS components comply with any and all applicable judicial decisions and orders, subject to the guidance of the Department of Justice.

15. If confirmed, how will you ensure DHS components comply with US and international obligations to properly review asylum and refugee cases and grant valid claimants entry into the United States?

If confirmed, I will ensure that sound, timely, and actionable guidance is issued to DHS components regarding their compliance with all applicable legal obligations to review asylum and refugee cases and grant valid claimants entry into the United States, and I will use my best efforts to ensure that such guidance is followed.

16. Based on your experience as a General Counsel and lawyer, please explain how you would work to secure the privacy of American citizens who may have to give up passwords or other sensitive information in the course of a border search?

If confirmed, I would work to secure the privacy rights of American citizens who may have to give up passwords or other sensitive information in the course of a border search by ensuring, in coordination with the DHS Privacy Office, that sound, timely, and actionable legal guidance is provided to Customs and Border Protection Personnel who carry out such searches regarding (1) the circumstances in which they may access such information, and (2) if such information is accessed, their obligations to safeguard the security of such information.

17. To construct a 2,000 mile wall on our southern border, the US. Government will have to procure vast stretches of land that are owned by private citizens, Native American tribes, and states. What, if any, role do you believe the Office of General Counsel should play in determining which parcels of land along the southern border need to be procured?

Although I have not been involved in any of the planning of the border wall, my view is that the determination of the property rights that will have to be procured will largely be driven by the operational requirements upon which the design(s) and precise location(s) of the wall will be based. Such determination is not a function of the Office of the General Counsel.

18. President Trump's executive order entitled, "Enhancing Public Safety in the Interior of the United States", calls on agencies to, "to the extent consistent with applicable law, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information." DHS representatives have told the committee that a wholesale removal of privacy act protections will not be possible given the sensitivity of some information. If confirmed, what steps will you take to implement this policy, and what changes, if any would you suggest to DHS's current interpretation of this policy?

At this time, I do not have access to the documents and information that I would need to review in order to respond to this question. If confirmed, at the request of the Committee, I will undertake a review of this matter.

19. CBP employees are responsible for the provision of accurate information to individuals wishing to enter the United States at ports of entry or along the border and for ensuring that those who wish to claim asylum are granted the opportunity to have their claims heard. Despite this, there have been reports that CBP officers and others in the employ of DHS have given inaccurate information to those presenting themselves at the border regarding their ability to claim asylum in the United States. As General Counsel, what do you believe your role should be in ensuring that DHS employees provide accurate information to the public? If confirmed, what steps will you take to examine and pursue the allegations that inaccurate information has been provided by DHS employees at the border?

If confirmed, as General Counsel I believe that my role would be to ensure that CBP personnel and other DHS employees receive sound, timely, and actionable legal guidance relating to the performance of their functions, including any obligation to provide information relating to applying for asylum. If confirmed, I will undertake a review of the referenced allegations.

III. Relations with Congress and the Public

20. If confirmed, how will you make certain that you will respond in a timely manner to Member requests for information?

If confirmed, in accordance with the relevant opinions of the Office of Legal Counsel of the Department of Justice, and subject to any necessary prioritization based on the availability of personnel and other resources, I will assign the personnel and other resources necessary to respond in a timely manner to Member requests for information.

21. If confirmed, do you agree without reservation to reply to any reasonable request for information from the Ranking Member of any duly constituted committee of the Congress?

If confirmed, in accordance with the relevant opinions of the Office of Legal Counsel of the Department of Justice, and subject to any necessary prioritization based on the availability of personnel and other resources, I agree to reply to any reasonable request for information from the Ranking Member of any duly constituted committee of the Congress.

22. If confirmed, do you agree without reservation to reply to any reasonable request for information from members of Congress?

If confirmed, in accordance with the relevant opinions of the Office of Legal Counsel of the Department of Justice, and subject to any necessary prioritization based on the availability of personnel and other resources, I agree to reply to any reasonable request for information from Members of Congress.

23. If confirmed, do you commit to take all reasonable steps to ensure that you and your agency complies with deadlines established for requested information?

If confirmed, in accordance with the relevant opinions of the Office of Legal Counsel of the Department of Justice, and within the scope of my authority as General Counsel, I commit to take all reasonable steps to ensure that I and my agency comply with deadlines established for requested information.

24. If confirmed, do you commit to protect subordinate officials or employees from reprisal or retaliation for any testimony, briefings or communications with members of Congress?

Yes, within the scope of my authority as General Counsel.

25. Do you agree without reservation to identify to the Committee all Presidential appointments (regardless of Senate confirmation requirements) within the Department? Do you agree without reservation to allow Committee staff, as requested, an opportunity to interview such appointments?

If confirmed, at the request of the Committee, I agree to identify to the Committee all Presidential appointees (regardless of Senate confirmation requirements) within the Department.

At the request of the Committee, I also agree to allow such appointees in the Department's Office of the General Counsel to be interviewed by Committee staff, and to forward any request from the Committee to interview such appointees serving in other components of the Department to the head(s) of such components.

26. If confirmed, will you ensure that your staff will fully and promptly provide information and access to appropriate documents and officials in response to requests made by the Government Accountability Office (GAO) and the Congressional Research Service?

Yes.

27. If confirmed, will you agree to work with representatives from this Committee and the GAO to promptly implement recommendations for improving the Department's operations and effectiveness?

If confirmed, I will support the Secretary of Homeland Security in exercising his or her authority to consider and implement recommendations for improving the Department's operations and effectiveness.

28. If confirmed, will you direct the Department to fully and promptly respond to Freedom of Information Act requests submitted by the American people?

Yes.

29. If confirmed, will you direct your agency to not waive Freedom of Information Act under section 102 of the Real I.D. Act for any project or program?

If confirmed, if the issue of the applicability of the Freedom of Information Act to actions taken in pursuance of such provision arises, I will undertake a thorough legal analysis of the issue and advise appropriate officials at DHS accordingly.

30. If confirmed, will you direct your staff to adopt a presumption of openness where practical, including identifying documents that can and should be proactively released to the public without requiring a Freedom of Information Act request?

Yes, when such openness is practical, appropriate, and lawful.

31. If confirmed, will you keep this Committee apprised of new information if it materially impacts the accuracy of information your agency's officials have provided us?

If confirmed, and within the scope of my authority as General Counsel, I will use my best efforts to keep this Committee apprised of new information if it materially impacts the accuracy of information that DHS officials have provided to the Committee, for a reasonable period of time after the original provision of such information.

I, John Marshall Mitnick, hereby state that I have read the foregoing Pre-hearing Questionnaire and supplemental questions and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.


(Signature)

This 13th day of September, 2017

**Senator Steve Daines
Post-Hearing Questions for the Record
Submitted to Mr. John Mitnick**

**Nomination of John M. Mitnick to be General Counsel
U.S. Department of Homeland Security
Tuesday, October 3, 2017**

Mr. Mitnick, thank you for your testimony, your willingness to serve, and for taking the time last month to meet and share how, as General Counsel, you will help advise and defend President Trump's efforts to secure our border and enforce our immigration laws.

One of the greatest successes of this Administration is President Trump signaling that we are going to enforce our laws. This has led to quantifiable improvements at the Department of Homeland Security (DHS), under the leadership of Gen. John Kelly and now Acting Secretary Elaine Duke. Apprehension rates for illegal Southwest border crossings have dropped nearly 30% year-to-date, compared to the same timeframe in 2016, and some months have seen an over 60% reduction. Drug seizures have increased by some measures. And, morale and improved by upwards of 7%, according to Acting Secretary Duke.

As General Counsel, how will you ensure the Department maintains this trajectory?

Senator Daines, thank you for your kind words and for meeting with me and considering my nomination. I am generally aware of the challenges that DHS has faced in integrating its multitude of components with varied missions, authorities, and cultures, and I was very pleased to hear of the improvement in morale. Having practiced law for over 28 years, and as the son and grandson of attorneys, I have a strong commitment to the rule of law. As a former senior attorney in DHS and a former Associate Counsel to the President with responsibility for homeland security legal matters, I have a strong commitment to assisting the President and the Acting Secretary in securing our borders while facilitating lawful international travel and trade. If confirmed, I will look forward to working closely with Acting Secretary Duke, the other senior leaders of DHS, and my colleagues in the Office of the General Counsel to support the dedicated professionals in the Department's operational components (including U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, and U.S. Citizenship and Immigration Services) in accomplishing our shared vital mission to safeguard the American people, our homeland, and our values. If confirmed, I will also do my part, as one of DHS's senior leaders, to promote the continued success and improving morale of the Department by continuing my commitment to the leadership and management principles and practices that I described in response to Question 6(a) in my Pre-hearing Questionnaire.

**Senator Thomas R. Carper
Post-Hearing Questions for the Record
Submitted to Mr. John Mitnick**

**Nomination of John M. Mitnick to be General Counsel
U.S. Department of Homeland Security
Tuesday, October 3, 2017**

1. In order for Congress to fulfill its constitutional duty to conduct oversight, members of Congress must be able to receive testimony, briefings and other information from the executive branch upon request. To ensure that you and your agency fulfill its obligations to respond to congressional inquiries in a timely and comprehensive manner, we ask the following:
 - a. If confirmed, do you commit without reservation to make any subordinate official or employee available to appear and testify before, or provide information to, committees of Congress?

Yes.

- b. If confirmed, do you commit without reservation to respond in a timely manner to all congressional inquiries and requests for information from members of Congress, including requests from members in the minority?

If confirmed, in accordance with the relevant opinions of the Office of Legal Counsel of the Department of Justice, and subject to any necessary prioritization based on the availability of personnel and other resources, I agree to respond in a timely manner to all congressional inquiries and requests for information from Members of Congress, including requests from Members in the minority.

- c. If confirmed, do you commit without reservation to take all reasonable steps to ensure that you and your agency comply with deadlines established for requested information?

If confirmed, in accordance with the relevant opinions of the Office of Legal Counsel of the Department of Justice, and within the scope of my authority as General Counsel, I commit to take all reasonable steps to ensure that I and my agency comply with deadlines established for requested information.

- d. If confirmed, do you commit without reservation to protect subordinate officials or employees from reprisal or retaliation for any testimony, briefings or communications with members of Congress?

Yes, within the scope of my authority as General Counsel.

2. In response to GAO recommendations, the Department has stated that it would develop performance measures that clearly measure the effectiveness of the EINSTEIN deployed to monitor federal networks and prevent cyber attacks. In a letter I received in March of 2016, the Department committed to having the performance metrics in place by March 31, 2017. Please provide an update on the status of the performance metrics.

At this time, I do not have access to the information that I would need to review in order to respond to this question. If confirmed, I will look into this matter.

In the past, I've expressed concerns about the pace of deployment of the most advanced version of EINSTEIN, EINSTEIN 3 Accelerated or E3A, across the federal government. Has the system been fully deployed and does the Department have the authority it needs to fulfill its mission to protect federal networks and ensure the latest protective technology is in place at every agency?

At this time, I do not have access to the information that I would need to review in order to respond to this question. If confirmed, I will look into this matter.

3. In January of this year, President Trump issued a travel ban that blocks travel to the U.S. from seven Muslim-majority countries. The roll-out caused chaos and confusion throughout the country as travelers, law enforcement agencies, and foreign officials struggled with the implementation of this haphazard executive order.

Since then, the President has signed two revised travel bans, even while the constitutionality of the original ban was scheduled to be reviewed by the Supreme Court. In your nomination hearing, you stated in response to a question from Senator Peters that you did not believe the travel bans made any mention of a specific religion. In fact, the initial travel ban established a preference for members of religious minorities for refugee admissions; the day the travel ban was issued, the President stated in an interview that he would prioritize admissions of Christians over refugees of other religions as part of the ban. Those comments were consistent with remarks he had made during the presidential campaign promising religious discrimination in admissions to the U.S.

If confirmed, do you commit that you will carefully review major policy directives, including their context, to ensure that we do not again witness the chaos that accompanied the rollout of the initial travel ban?

In responding to Senator Peters' question, my intention was to express my understanding that nationals of specific countries, and not religious groups or people of any particular religious faith, were and are subject to the travel restrictions in those presidential documents, particularly pursuant to the Proclamation issued by the President on September 24, 2017. If confirmed, I will carefully review major policy directives,

including their context, in order to provide sound, timely, and actionable legal advice. I will also provide such advice to other DHS senior leaders in the course of their participation in the executive branch's policy development and coordination process, and participate in such process when and as appropriate, in order to ensure that DHS is engaged and effective in executing its mission. In doing so, I will draw upon my previous experience in the White House Counsel's Office, where I drafted dozens of executive orders, presidential directives, and other presidential policy documents.



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EDWIN MEESE III
Ronald Reagan Distinguished Fellow

September 25, 2017

The Honorable Ron Johnson
Chairman
U.S. Senate Committee on Homeland Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Claire McCaskill
Ranking Member
U.S. Senate Committee on Homeland Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of John Mitnick for General Counsel, Department of Homeland Security

Dear Chairman Johnson and Ranking Member McCaskill:

I am writing in strong support of the nomination of John M. Mitnick to serve as the General Counsel for the U.S. Department of Homeland Security (DHS). I have known John for over three years, both professionally and personally, in my capacity as a member of the Board of Trustees of The Heritage Foundation. During that time, John has been the Senior Vice President, General Counsel, and Secretary of Heritage. Because of his direct working relationship with the Board, I have had considerable opportunity to observe John's performance of his extensive responsibilities and to personally evaluate his work product, capabilities, and personal qualities.

John is an outstanding lawyer, an excellent manager, and a man of the highest integrity and personal qualities. He has served the Board during a time when numerous difficult personnel and legal problems required resolution. In advising the Board John proved to demonstrate an unusual ability to solve problems, provide exceptional advice, and manage difficult personalities in a way that resulted in the successful conclusion of the legal and managerial matters involved. He has shown a particular talent for handling critical and complex issues where legal matters and public affairs intersect.

John has had a unique experience during his prior positions that particularly fits the responsibilities of General Counsel for DHS. His service in the Department of Justice, the White House, and DHS itself has provided him with a thorough knowledge of homeland security and the various components of the Federal Government involved in the protection of the Nation. The importance of sound legal counsel in addressing the many issues that national security presents makes the DHS General Counsel one of the key positions in the Executive Branch. John's extensive background, and his excellent performance in every position he has held, make him unusually well-qualified for the post for which he has been nominated.

John has the ability to get along well with others and he is highly respected by superiors, subordinates, and peers alike. He matches superb legal prowess with commendable interpersonal skills and a superior work ethic.

During my own experience, including as Attorney General of the United States, I have had the opportunity to recruit, hire, and promote many attorneys and executives. It is on that basis that I can evaluate John as one of the most capable lawyers I have known.

For these reasons I am pleased to enthusiastically recommend John Mitnick for confirmation as General Counsel of DHS, where I am sure he will be an asset in the service of our Country.

Thank you for your consideration of this recommendation. If you require any further information from me, please do not hesitate to contact me at the above address.

Very truly yours,



Edwin Meese III
Ronald Reagan Distinguished
Fellow Emeritus